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No. ____

In the
Supreme Court of the United States
October Term, 1994

PAUL S. ERICKSON, *Petitioner,*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Respondent.*

On Petition for a Writ of Certiorari to
the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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February 2, 1995

QUESTIONS PRESENTED

1. Whether the Sixth and Fourteenth Amendments are violated when post-conviction claims of ineffective assistance of trial counsel under *Strickland v. Washington* are deemed waived by a state court even though the claims rely in substantial and essential part on new evidence of trial counsel's unreasonable conduct and resulting prejudice which was not available at the time of, nor contained in the record on, direct appeal.

2. Whether rights of fundamental fairness and due process under the Fourteenth Amendment are violated when, under a state post-conviction statute that provides a forum for the redress of constitutional violations, a condemned defendant is arbitrarily precluded on grounds of waiver from receiving a hearing on evidence supporting constitutional claims that previously could not have been successfully raised due to the unavailability of sufficient evidence to meet the requisite standards for relief.

3. Whether a condemned defendant's right to a fair sentencing hearing under the Eighth and Fourteenth Amendments is violated when the sentence of death is based upon evidence that can now be shown to be fraudulent, incompetent and materially inaccurate.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Petitioner's Conviction And Sentence Of Death 5

B. New Evidence And Petitioner's Post-Conviction Petition 9

C. The Illinois Trial And Supreme Court Decisions Denying An Evidentiary Hearing On The Post-Conviction Petition 11

REASONS FOR GRANTING THE WRIT 13

I. THE ILLINOIS DECISION EVISCERATES THE SIXTH AMENDMENT RIGHTS ACCORDED DEFENDANTS UNDER *STRICKLAND* AND IS SUCH A SUBSTANTIAL DEPARTURE FROM FEDERAL AND STATE PRECEDENT THAT REVIEW BY THIS COURT IS REQUIRED . . 14

A. Waiver of Petitioner's Sixth Amendment Claims Cannot Occur When Those Claims Are Based On New Evidence That Could Not Have Been Raised On Direct Appeal 15

B. The Illinois Decision Is Contrary To Established Sixth Amendment Precedent Recognizing That Criminal Defendants Must Have An Opportunity To Locate And Proffer Evidence Outside The Record 17

II. THE "CATCH-22" CREATED BY THE ILLINOIS RULING VIOLATES FUNDAMENTAL RIGHTS OF DUE PROCESS AND MUST BE REVIEWED BY THIS COURT 20

A. Petitioner Has A Fundamental Due Process Right To Be Heard On His Constitutional Claims 21

B. The Illinois Supreme Court's Decision Violates Due Process By Forcing Individuals To Gamble On Which Procedural Avenue Will Vindicate Their Constitutional Rights 23

III. SUPREME COURT REVIEW IS NECESSARY TO UPHOLD CONSTITUTIONAL STANDARDS GOVERNING CAPITAL SENTENCES IMPOSED ON THE BASIS OF MATERIALLY INACCURATE INFORMATION 27

A. The Trial Court's Consideration Of Weliczko's False And Inaccurate "Psychological" Analysis Violated Petitioner's Right Not To Be Sentenced On Materially Inaccurate Information 28

B. Petitioner's Sentencing Hearing Denied Him A Right To A Competent Psychiatric Evaluation Untainted With Perjury 29

CONCLUSION 30

APPENDIX 1a

Decision of Illinois Supreme Court Affirming Dismissal Without Evidentiary Hearing of Post-Conviction Petition ("*Erickson II*") 1a

Order of Illinois Supreme Court Denying Rehearing in *Erickson II* 37a

Transcript of Decision of Cook County Circuit Court Dismissing Without Evidentiary Hearing Post-Conviction Petition 38a

Transcript of Decision of Cook County Circuit Court Denying Rehearing 63a

Decision of Illinois Supreme Court on Direct Appeal Affirming Conviction and Sentence of Death ("*Erickson I*") 70a

Illinois Death Penalty Statute, Ill. Rev. Stat. ch. 38, ¶ 9-1 (1981) 112a

TABLE OF AUTHORITIES

Cases: **Page**

Ake v. Oklahoma, 470 U.S. 68 (1985) 29

Amin v. State, 744 P.2d 597 (Wyo. 1984) 19

Baldwin v. Hale, 68 U.S. 223 (1863) 24

Billy-Eko v. United States, 8 F.3d 111 (2d Cir. 1993) . 18

Boddie v. Connecticut, 401 U.S. 371 (1971) 21

Brown v. Dodd, 484 U.S. 874 (1987) 29

Carter v. Illinois, 329 U.S. 173 (1946) 22

Carter v. State, 108 Idaho 788, 702 P.2d 826 (1985) . 20

Colvin v. State, 299 Md. 88, 472 A.2d 953, *cert. denied*, 469 U.S. 873 (1984) 19

Duross v. State, 494 A.2d 1265 (Del. 1985) 19

Erickson v. Illinois, 486 U.S. 1017 (1988) 8

Gardner v. California, 393 U.S. 367 (1969) 23

Griffin v. Illinois, 351 U.S. 12 (1956) 22, 23

Guinan v. United States, 6 F.3d 468 (7th Cir. 1993) 16,17,18,26

Harris v. Vasquez, 901 F.2d 724 (9th Cir. 1990) 29

Johnson v. Mississippi, 486 U.S. 578 (1988) 27, 28

Kallas v. State, 776 P.2d 198 (Wyo. 1989) 19

Kimmelman v. Morrison, 477 U.S. 365 (1986) 14

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 21, 23

Matthews v. State, 839 P.2d 1215 (Idaho 1992) 19

McMann v. Richardson, 397 U.S. 759 (1970) 14

Mu'min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990), *aff'd on other grounds*, 500 U.S. 415 (1991) 19

Murray v. Giarratano, 492 U.S. 1 (1989) 22

Napue v. Illinois, 360 U.S. 264 (1959) 29

Patterson v. New York, 432 U.S. 197 (1977) 21

Pennsylvania v. Finley, 481 U.S. 551 (1987) 22, 23

People v. Albanese, 125 Ill. 2d 100, 531 N.E.2d 17 (1988), *cert. denied*, 490 U.S. 1075 (1989) 25

People v. Emerson, 153 Ill. 2d 100, 606 N.E.2d 1123 (1992), *cert. denied*, 113 S. Ct. 1865 (1993) . . . 24, 25

People v. Enoch, 146 Ill. 2d 44, 585 N.E.2d 115 (1991), *cert. denied*, 113 S. Ct. 56 (1992) 25

People v. Erickson, 117 Ill. 2d 271, 513 N.E.2d 367 (1987) 2

People v. Flores, 231 Ill. App. 3d 813, 596 N.E.2d 1204 (1992) 19

People v. Hall, 157 Ill. 2d 324, 626 N.E.2d 131 (1993), *cert. denied*, 115 S. Ct. 507 (1994) 25

People v. Jones, 109 Ill. 2d 19, 485 N.E.2d 363 (1985), *cert. denied*, 475 U.S. 1090 (1986) 25

People v. Jones, 155 Ill. 2d 357, 614 N.E.2d 1219, *cert. denied*, 114 S. Ct. 444 (1993) 25

People v. Kunze, 193 Ill. App. 3d 708, 550 N.E.2d 284 (1990) 20

People v. Morris, 229 Ill. App. 3d 144, 593 N.E.2d 932 (1992) 20

People v. Silagy, 116 Ill. 2d 357, 507 N.E.2d 830, *cert. denied*, 484 U.S. 873 (1987) 25

People v. Thomas, 867 P.2d 80 (Colo. 1994) 19

People v. Williams, 147 Ill. 2d 173, 588 N.E.2d 983 (1991), *cert. denied*, 113 S. Ct. 218 (1992) 24

People v. Wilson, 3 Cal. 4th 926, 838 P.2d 1212 (1992), *cert. denied*, 113 S. Ct. 1648 (1993) 18, 19

Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464 (1918) 23

Scruggs v. State, 484 N.W.2d 21 (Minn. 1992) 19

Snyder v. Massachusetts, 291 U.S. 97 (1934) 21

State v. Courchene, 256 Mont. 381, 847 P.2d 271 (1992) 19

State v. Gabaree, 149 Vt. 229, 542 A.2d 272 (1988) . 19

State v. Larson, 512 N.W.2d 732 (S.D. 1994) 19

State v. Maturana, 882 P.2d 933 (Ariz. 1994) 18

State v. Mitchell, 593 A.2d 1047 (Me. 1991) 19

State v. Silva, 75 Haw. 419, 864 P.2d 583 (1993) . . . 19

State v. Sireci, 536 So. 2d 231 (Fla. 1988) 29

State v. Tooher, 542 A.2d 1084 (R.I. 1988) 19

State v. Williamson, 206 Conn. 685, 539 A.2d 561 (1988) 19

Strickland v. Washington, 466 U.S. 668 (1984) . . passim

Truax v. Corrigan, 257 U.S. 312 (1921) 24

United States v. Daniels, 3 F.3d 25 (1st Cir. 1993) . . 18

United States v. Davenport, 986 F.2d 1047 (7th Cir. 1993) 17

United States v. DeRewal, 10 F.3d 100 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1544 (1994) 18

United States v. Ellis, 23 F.3d 1268 (7th Cir. 1994) . . 18

United States v. Hanoum, 33 F.3d 1128 (9th Cir. 1994) 18

United States v. Marcum, 16 F.3d 599 (4th Cir.), *cert. denied*, 115 S. Ct. 137 (1994) 18

United States v. Moss, 9 F.3d 543 (6th Cir. 1993) . . . 18

United States v. Perez-Tosta, 36 F.3d 1552 (11th Cir. 1994) 18

United States v. Scott, 26 F.3d 1458 (8th Cir.), *cert. denied*, 115 S. Ct. 584 (1994) 18

United States v. Wallace, 32 F.3d 921 (5th Cir. 1994) 18

United States v. Yates, 22 F.3d 981 (10th Cir. 1994) . 18

Vitek v. Jones, 445 U.S. 480 (1980) 22

Young v. Ragen, 337 U.S. 235 (1949) 23

Statutes:

28 U.S.C. § 1257(a) 2

Ill. Rev. Stat. ch. 38, ¶ 9-1 (1981) 4, 5

Ill. Rev. Stat. ch. 38, ¶ 122-1 (1989) 3, 9

735 ILCS 5/122-1 to 122-8 (1994) 22

In the
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PAUL S. ERICKSON, *Petitioner,*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Paul S. Erickson respectfully petitions for a writ of certiorari to review the judgment and opinion of the Illinois Supreme Court on the petition for post-conviction relief in this case.

OPINIONS BELOW

The majority opinion of the Illinois Supreme Court affirming the trial court's dismissal without an evidentiary hearing of petitioner's post-conviction petition, and the dissent filed by Justice McMorrow and joined by Justice Harrison, are reported at 161 Ill. 2d 82 and 641 N.E.2d 455 and are reprinted in the Appendix hereto at pp. 1a-36a. The Illinois Supreme Court's order denying rehearing is unreported and is reprinted in the Appendix hereto at p. 37a. The decision of the Circuit Court of Cook County, Illinois was delivered from the bench and is unreported; the transcript of the decision is reprinted in the Appendix hereto at pp. 38a-62a. The decision of the Circuit

Court of Cook County, Illinois denying rehearing was also delivered from the bench and is unreported; the transcript of the decision is reprinted in the Appendix hereto at pp. 63a-69a. The decision of the Illinois Supreme Court affirming petitioner's conviction and sentence of death on direct appeal is reported at 117 Ill. 2d 271 and 513 N.E.2d 367 and is reprinted in the Appendix hereto at pp. 70a-111a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The order of the Illinois Supreme Court affirming the dismissal of petitioner's post-conviction petition was entered on July 28, 1994. After two short extensions of time were granted on August 9 and 30, 1994, petitioner filed a timely petition for rehearing on September 22, 1994. The order of the Illinois Supreme Court denying petitioner's rehearing petition was entered on October 3, 1994. On December 9, 1994, Justice Stevens signed an order extending the time for filing this petition for certiorari to and including February 2, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth, Eighth and Fourteenth Amendments to the United States Constitution provide, in pertinent part, as follows:

AMENDMENT VI.

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

The Illinois Post-Conviction Hearing Act provides, in pertinent part, as follows:

> Petition in the Trial Court. Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. . . .

Ill. Rev. Stat. ch. 38, ¶ 122-1 (1989) (recodified, as amended in other part, at 725 ILCS 5/122-1). The text of the Illinois

Death Penalty Statute, Ill. Rev. Stat. ch. 38, ¶ 9-1 (1981), is set out in the Appendix hereto at pp. 112a-117a due to its length.

STATEMENT OF THE CASE

This capital case presents important issues concerning the constitutional protections of the Sixth, Eighth and Fourteenth Amendments which have been infringed by the Illinois Supreme Court's refusal to allow criminal defendants to pursue constitutional claims in a post-conviction proceeding based on compelling new evidence not available on direct appeal. After he was convicted and sentenced to death, petitioner learned that John Weliczko—the sole witness called by trial counsel to present evidence of petitioner's mental disability—was a fraud whose supposedly "mitigating" testimony was grossly incompetent and wrong. Although this new evidence was not in the record at the time of direct appeal, the Illinois Supreme Court nonetheless dismissed the petition for post-conviction relief brought by petitioner, based on a determination that petitioner had waived his claims concerning Weliczko's testimony and the ineffectiveness of trial counsel by failing to raise them on direct appeal.

This decision is directly contrary to existing precedent and effectively precludes condemned defendants from asserting their Sixth Amendment rights to effective assistance of counsel. As explained by the dissent below, the Illinois ruling has "trapped" defendants into "a classic 'catch-22' . . . of losing scenarios" where defendants must prematurely raise claims of ineffective assistance on direct appeal—even though the evidence for such claims is not yet available and a rejection of the claim will be *res judicata*—or risk a later finding of waiver. This result not only impermissibly infringes upon the

rights guaranteed by the Sixth Amendment, but also affronts basic fundamental principles of fairness and due process protected by the Fourteenth Amendment. Finally, petitioner's sentence was imposed in violation of the Eighth Amendment's prohibition on the consideration of materially inaccurate testimony in the imposition of a capital sentence—an issue that was completely ignored by the Illinois Supreme Court in its opinion.

A. Petitioner's Conviction And Sentence Of Death

After a jury trial held before the Honorable Michael P. Toomin in the Circuit Court of Cook County, Illinois beginning on July 22, 1983, petitioner was convicted of the rape and murder of Elizabeth Launer and the concealment of her homicide. A bench death sentencing hearing was then held. At all times in the trial court, petitioner was represented by Glenn Seiden, who was retained by petitioner's parents to serve as trial counsel.

At the death sentencing hearing, petitioner sought to establish that he suffered a severe emotional and mental disability so as to mitigate his actions.[1] The only evidence in mitigation presented by Seiden was the testimony of John Weliczko. Weliczko had been providing petitioner's *parents* with psycho-

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[1] One of the statutory mitigating factors under Illinois law is that "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution." Ill. Rev. Stat. ch. 38, ¶ 9-1(c)(2) (1981). Absent some mitigating circumstances, a sentence of death is mandatory if the State establishes at least one statutory aggravating circumstance. *Id.*, ¶ 9-1(h). In this case, the trial court found that the State had met its burden of proving beyond a reasonable doubt the existence of an aggravating factor, given that petitioner had murdered Launer during the course of another felony (rape).

logical counseling since shortly after petitioner was arrested. When petitioner's trial commenced, Weliczko attended the proceedings for a fee and suggested to petitioner's parents that he could prepare a psychological evaluation report on behalf of their son. After being introduced by petitioner's parents, Seiden asked Weliczko to prepare such a report for use at the sentencing hearing and to testify, supposedly in mitigation.

Weliczko's Impeachment and Testimony

Prior to the sentencing hearing, Seiden believed Weliczko was a qualified psychologist. On direct examination Weliczko testified, among other things, that he held a Ph.D. in psychology from the University of Chicago and a bachelor's degree in psychology and philosophy. However, when cross-examined on his credentials by the State, Weliczko admitted that he was not a psychologist and did not have a degree in psychology from the University of Chicago. Weliczko nevertheless insisted that he did have a doctorate degree in counseling psychology from a theological seminary affiliated with the University of Chicago. Weliczko described himself as a "psychotherapist" and testified that he had taken courses in counseling, psychology and "the methodology of that particular thing."

Based on this testimony, Judge Toomin refused to certify Weliczko as an expert witness because he was not a clinical psychologist as required by the Illinois Criminal Code. The judge did, however, permit Weliczko to testify as a lay witness.

This testimony, supposedly offered in mitigation, consisted of Weliczko's opinion that petitioner had been raised in an "ideal" and "good Christian home." Weliczko stated he did not find any evidence that petitioner had suffered abuse as a child and that petitioner had been given things many other

children never receive. This upbringing notwithstanding, Weliczko testified that petitioner was "quarrelsome," "preoccupied with money" and that he had been often caught in lying and manipulating behavior as a teenager. Weliczko stated that petitioner was angry at the individuals who had testified at trial against him and that he could be violent. Weliczko also testified that petitioner did not feel remorseful about anything, and that he felt sorry for no one but himself.

Ultimately, Weliczko concluded that petitioner had a "narcissistic personality disorder" and that he was a liar and a cheat. Weliczko stressed that petitioner's parents could not be blamed for his personality disorder.

Trial Counsel's Response to Weliczko's Testimony

After Weliczko concluded his testimony, Seiden requested a continuance to obtain a medical opinion to support the statutory mitigating factor of extreme mental or emotional disturbance. Seiden advised the judge that he had been taken by surprise at what was revealed concerning Weliczko's credentials. The State objected to the continuance and it was denied.

Seiden offered no other witnesses on behalf of petitioner. The State, however, called a psychiatrist in rebuttal who testified that petitioner had an antisocial personality disorder with features of narcissism; he nevertheless opined that petitioner was not operating under any mental illness or defect. After hearing closing argument and specifically indicating that he would consider Weliczko's testimony and report, Judge Toomin sentenced petitioner to death.

Direct Appeal

On direct appeal to the Illinois Supreme Court, petitioner was represented by the Office of the State Appellate Defender, who raised numerous challenges to the manner in which the jury was impanelled, the trial was conducted and to the sentencing hearing. In particular, counsel asserted that the court's denial of Seiden's request for a continuance violated petitioner's right to a fair trial under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Significantly, however, the only evidence before the court on direct appeal was the record of Weliczko's testimony itself; having been denied the requested continuance, petitioner had been unable to offer any other medical evidence as to his emotional or mental disability and had no further evidence as to Weliczko's qualifications, competence or credibility as a lay witness.

A divided Illinois Supreme Court subsequently affirmed petitioner's conviction and sentence of death. (App. 70a.) In particular, the court concluded that the denial of a continuance to locate a qualified expert witness was not improper. The court reasoned that counsel had adequate time prior to the hearing to locate an expert, and that petitioner was not in any case prejudiced since the court accepted and indicated that it would weigh the testimony and report of petitioner's witness, whom the court referred to as "Dr. John Weliczko, a psychotherapist." (App. at 78a, 94a-95a.) This Court subsequently denied certiorari. *See Erickson v. Illinois*, 486 U.S. 1017 (1988).

B. New Evidence And Petitioner's Post-Conviction Petition

Following his sentencing and direct appeal, petitioner obtained compelling evidence concerning the incompetence of his counsel and the accuracy of the information considered by the trial court in sentencing petitioner to death. Specifically, petitioner learned that Weliczko was not a mental health professional of *any* kind, but instead was a complete fraud and a con artist who had duped both petitioner and his family. In light of Weliczko's lack of psychological expertise, petitioner was finally examined by legitimate, highly-qualified medical experts who found that petitioner had a significant "chronic and longstanding" neurological impairment. (App. 33a-35a (McMorrow, J., dissenting).)

This and other new evidence was submitted by way of affidavits in a petition under Illinois' Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶ 122-1 (1989). Among other things, petitioner asserted that his Sixth and Fourteenth Amendment rights were violated when his trial counsel failed to investigate Weliczko, called him to testify as an expert supposedly on petitioner's behalf, and failed to obtain competent psychological evidence that would have established a statutory mitigating factor. Petitioner further asserted that his death sentence violated the Eighth and Fourteenth Amendments because it was based on fraudulent and incompetent testimony.

Evidence of Weliczko's Fraud and the Incompetence of His "Psychological" Report

As set forth in his post-conviction petition, petitioner now has evidence that Weliczko was far worse than just a "psychotherapist" with confused credentials. The post-conviction

petition contained evidence showing that Weliczko had *no* psychology degrees at all and had apparently never taken *any* courses in psychology.

Weliczko was also shown to have admittedly engaged in a pattern of fraudulent behavior, including a guilty plea to charges of bankruptcy fraud. In connection with that federal indictment, the United States filed a memorandum in 1988 describing Weliczko's repeated lies and frauds, including his testimony in petitioner's case:

> John Weliczko's lies also have endangered people's welfare. By falsely holding himself out as a psychologist, Weliczko has defrauded vulnerable people in need of help who came to him for professional psychological assistance. They did not receive such assistance from Weliczko. *Paul Erickson, whose future would be decided at a sentencing hearing, deserved to have a trained psychologist speak on his behalf. Instead, he had a man puffing himself up and masquerading as a psychologist.*

(Emphasis added.)

The post-conviction petition also contained evaluations of Weliczko's supposed "psychological" report by Dr. Brad Fisher, a clinical correctional psychologist, and from Dr. Henry G. Conroe, a clinical psychiatrist. Both concluded that Weliczko's report departed significantly from a competent psychological or psychiatric evaluation, and that Weliczko's conclusions were not warranted by the information presented, but instead appeared to represent Weliczko's personal views.

Evidence of Petitioner's Serious Neurological Impairments

In the post-conviction petition, Dr. Fisher and David M. Randall, a doctoral candidate in clinical psychology, also

provided for the first time competent evaluations of petitioner's mental condition at the time of his offense and his social history. As described at length in Justice McMorrow's dissent, both concluded that petitioner had significant and diffuse neurological impairments that existed at the time of the offense and probably resulted from chronic drug and alcohol abuse, as well as from several documented head traumas. Based on a number of tests administered to petitioner, Dr. Fisher's psychological report also determined that petitioner likely has a significant level of brain damage. Contrary to Weliczko's testimony, moreover, petitioner's upbringing was far from "ideal"; his mother was described as schizophrenic, and as a young boy petitioner had been sexually abused by a parish priest. (App. at 33a-35a.)

Ultimately, Dr. Fisher's report concluded that petitioner has significant difficulties in cognition, meaning that he lacks the ability to fully appreciate and understand the long term consequences of his actions, to think logically and strategically in stressful situations and to utilize appropriate judgment. The report further finds that petitioner was under extreme mental and emotional disturbance at the time of his offenses and that his capacity to conform his conduct to the requirements of the law was substantially impaired. (App. at 33a.)

C. The Illinois Trial And Supreme Court Decisions Denying An Evidentiary Hearing On The Post-Conviction Petition

The State moved to dismiss the post-conviction petition on the grounds that it failed to make the requisite showing of a constitutional violation. After hearing argument, the circuit court judge granted the State's motion without giving petitioner the opportunity for an evidentiary hearing on his claims. (App.

at 62a.) The trial court subsequently refused to reconsider its ruling. (App. at 67a-68a.)

On July 28, 1994, a divided Illinois Supreme Court affirmed the circuit court's dismissal of the petition. (App. at 1a.) Notwithstanding the substantial new evidence submitted by petitioner, a majority of the court refused to consider the whole of the circumstances giving rise to petitioner's Sixth and Fourteenth Amendment claims of ineffective assistance of counsel because of its view that the claims should have been raised on direct appeal. (App. at 5a-6a.) The majority indicated that any claims based solely on the new psychological reports and certain other new evidence were also waived. (App. at 5a-6a.) The majority went on, however, to find this evidence, viewed in isolation, did not establish the requisite prejudice under *Strickland* since "the trial judge on his own considered, and rejected, the gist of what defendant hoped the evidence might show." (App. at 8a.) The majority did not address petitioner's claims that to impose a death sentence based on fraudulent, perjured and grossly incompetent evidence violated the Eighth Amendment. (*Cf.* App. at 1a-5a.)

Justice McMorrow filed a vehement dissent joined by Justice Harrison in which she described in detailed and compelling terms how the majority's "disturbing and troubling" decision violated fundamental principles of federal and Illinois law in holding that defendant waived his claims to ineffective counsel, even though his post-conviction petition was based on evidence that could not have been raised on appeal. (App. at 18a-24a.) The dissent also described at length the facts proffered by the petitioner as to Weliczko's fraud and the psychological evidence which mandated an evidentiary hearing on his claims. (App. at 28a-35a.)

On October 3, 1994, the Illinois Supreme Court denied petitioner's request for a rehearing of his claims. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

This case raises, in the most stark terms, the fundamental constitutional protections that must be in place to ensure fair and correct decisions in our criminal justice system. Here, Illinois has held that, even though a defendant has come forward with compelling evidence of fraud and incompetence that was not available in the trial record, his claims of ineffectiveness of counsel are waived. Rather than being able to present this evidence through collateral proceedings--as this Court, the federal circuits and most other states provide—the Illinois decision requires defendants to gamble by raising their claims on an incomplete record on direct appeal, despite the specter that such an inadequate appeal will preclude later meritorious claims. Such a ruling flies in the face of this Court's *Strickland* test, which requires a showing under the Sixth Amendment that counsel's performance was both unreasonable *and* resulted in prejudice to the defendant. The Illinois decision nowhere explains how such a showing can ever be satisfactorily made on direct appeal, where defendant is unable to enlarge the factual record to show what might have been done and to what end. As a result, the Illinois court has effectively eviscerated the ability of criminal defendants to protect their Sixth Amendment rights.

What defendants are left with is a Hobson's choice either to pursue an inadequate appeal and risk a later ruling of *res judicata* or, as in this case, to wait until sufficient facts are developed and risk a ruling of waiver. Such a "catch-22" is

unacceptable, especially where, as here, the ultimate penalty of death is to be imposed based on what has been exposed as fraudulent, perjured and grossly inaccurate and incompetent testimony. The principles of fundamental fairness inherent in the Constitution simply do not permit a State to deny a defendant the opportunity to prove that his basic rights have been violated. Nor does the Constitution permit the death sentence to be levied, as here, on the basis of lies and fraud.

Review by this Court is essential in order to restore the protections of the federal Constitution in Illinois, and to provide clarity throughout the criminal justice system.

I.
THE ILLINOIS DECISION EVISCERATES THE SIXTH AMENDMENT RIGHTS ACCORDED DEFENDANTS UNDER *STRICKLAND* AND IS SUCH A SUBSTANTIAL DEPARTURE FROM FEDERAL AND STATE PRECEDENT THAT REVIEW BY THIS COURT IS REQUIRED

This Court repeatedly has made clear that "'the right to counsel is the right to *effective* assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *accord Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). Under *Strickland*, this right is violated when a convicted defendant shows both "acts or omissions of counsel that are [ ] not . . . the result of reasonable professional judgment" *and* resulting prejudice sufficient to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 690, 694.

The Illinois Supreme Court said it was applying this standard in this case, (App. 6a-8a); yet its decision creates an insurmountable hurdle for defendants seeking to meet the *Strickland* standard. Provided the record on direct appeal contains even a small quantum of evidence that may show ineffective assistance, Illinois now says defendants must forego the opportunity to locate additional evidence to meet *Strickland*'s demanding standard and instead prematurely raise their Sixth Amendment claim on direct appeal. Petitioner here having failed to do so, and regardless of the compelling evidence brought forward in the post-conviction petition, his claims are waived. Illinois clings to this approach, moreover, despite the fact that every federal circuit and all but one other State have recognized that both *Strickland* itself and concerns of fundamental fairness require that claims of ineffective assistance of counsel be allowed in collateral proceedings precisely because outside evidence must inevitably be adduced to meet the *Strickland* standard. The Illinois decision cannot stand.

A. Waiver Of Petitioner's Sixth Amendment Claims Cannot Occur When Those Claims Are Based On New Evidence That Could Not Have Been Raised On Direct Appeal

Petitioner asserts he was denied his Sixth Amendment rights as a result of counsel's egregious failure to investigate Weliczko's *bona fides*, counsel's use of only incompetent, inaccurate and perjured testimony on petitioner's behalf, and a resulting failure to obtain competent expert psychological evidence of petitioner's mental and emotional disability for use at the sentencing hearing. Contrary to the Illinois Supreme Court's opinion, these ineffective assistance claims *in no way* could have been successfully presented on direct appeal; the

evidence supporting the claims simply was not in the record on direct appeal. While it is true that some of Weliczko's qualifications—or rather, lack thereof—were brought out on cross-examination, (App. at 2a), the post-conviction petition raised allegations and attached evidence in support that "went far beyond the revelations to which Weliczko admitted when he testified at the defendant's sentencing hearing." (App. at 16a (McMorrow, J., dissenting).)

These post-conviction submissions included evidence that, contrary to his testimony on both direct and cross examination, Weliczko never received *any* degree from *any* institution in the area of psychology. More important, there were psychological and psychiatric reports that for the first time established the prejudice petitioner suffered as a result of counsel's failure. No longer could the State argue that petitioner had not been harmed because a qualified psychologist might have arrived at the same conclusions as Weliczko.

Finally, the post-conviction petition for the first time provided a forum for determining why trial counsel acted as he did.[2] It is a staple of Sixth Amendment jurisprudence that "[o]ften, indeed usually, the effectiveness of a trial lawyer's performance cannot be evaluated without an evidentiary hearing at which the lawyer is asked to explain why he did not follow seemingly promising lines of defense." *Guinan v. United States*, 6 F.3d 468, 471 (7th Cir. 1993).

In short, petitioner's ineffective assistance claim necessarily turns on matters outside the record on direct appeal. Conse-

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[2] The petition raised evidence of a serious fee dispute between Seiden and the Ericksons during the trial that may have impermissibly influenced Seiden's behavior.

quently, the claim should not have been deemed waived. As Justice McMorrow stated:

> The majority wholly ignores that the defendant's arguments, with respect to the failure to investigate and present evidence that Weliczko had no credentials to provide any testimony regarding a psychological profile of the defendant, relies upon evidence *outside the record of the defendant's direct appeal*. As such, the defendant's arguments, which relied upon this evidence, could not have been raised in his direct appeal, and are not waived in defendant's post-conviction proceeding.

(App. at 18a (McMorrow, J., dissenting) (emphasis in original).)

B. The Illinois Decision Is Contrary To Established Sixth Amendment Precedent Recognizing That Criminal Defendants Must Have An Opportunity To Locate And Proffer Evidence Outside The Record

As this Court held in *Strickland*, neither counsel's deficient performance nor resulting prejudice is ordinarily presumed. *See Strickland*, 466 U.S. at 692-93. Thus, the very nature of the *Strickland* test demands that a defendant not be forced to pursue prematurely an ineffective assistance claim on direct appeal. As one judge has noted, the "trial record [on direct appeal] is *always* inadequate to support a successful claim of ineffective-assistance." *Guinan*, 6 F.3d at 475 (Easterbrook, J., concurring) (emphasis in original). "Thus a defendant who presents an ineffective assistance claim for the first time on direct appeal has little to gain and everything to lose." *United States v. Davenport*, 986 F.2d 1047, 1050 (7th Cir. 1993). Indeed, requiring ineffective assistance claims to be raised on direct appeal forces defendants "to put [their] head on the chop-

ping block [and] surrender [ ] an opportunity" to raise the ineffective assistance claim in a post-conviction petition. *Guinan*, 6 F.3d at 475 (Easterbrook, J., concurring). Justice McMorrow, in dissent here, aptly characterized the dilemma created by the Illinois court as "necessarily plac[ing] all criminal defendants of this State into a classic 'catch-22,' where they run the risk of being trapped in a number of 'losing' scenarios." (App. at 23a (McMorrow, J., dissenting).)

To avoid this trap, the federal courts of appeals have recognized that claims of ineffective assistance based on evidence outside the record on appeal are not properly raised on direct appeal. If such claims are raised on direct appeal, review is declined in order to leave open the opportunity for post-conviction relief. *See United States v. Daniels*, 3 F.3d 25, 26-27 (1st Cir. 1993); *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993); *United States v. DeRewal*, 10 F.3d 100, 103-04 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1544 (1994); *United States v. Marcum*, 16 F.3d 599, 603 n.4 (4th Cir.), *cert. denied*, 115 S. Ct. 137 (1994); *United States v. Wallace*, 32 F.3d 921, 930 (5th Cir. 1994); *United States v. Moss*, 9 F.3d 543, 552 (6th Cir. 1993); *United States v. Ellis*, 23 F.3d 1268, 1274 (7th Cir. 1994); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir.), *cert. denied*, 115 S. Ct. 584 (1994); *United States v. Hanoum*, 33 F.3d 1128, 1131-32 (9th Cir. 1994); *United States v. Yates*, 22 F.3d 981, 985-86 (10th Cir. 1994); *United States v. Perez-Tosta*, 36 F.3d 1552, 1563 (11th Cir. 1994).

Likewise, other states that have addressed this issue have almost uniformly concluded that ineffective assistance claims are to be addressed post-conviction, rather than on an undeveloped record in direct appeal. *See, e.g., State v. Maturana*, 882 P.2d 933, 940 (Ariz. 1994); *People v. Wilson*,

3 Cal. 4th 926, 936, 838 P.2d 1212, 1217 (1992), *cert. denied*, 113 S. Ct. 1648 (1993); *People v. Thomas*, 867 P.2d 880, 886 (Colo. 1994); *State v. Williamson*, 206 Conn. 685, 706, 539 A.2d 561, 571 (1988); *Duross v. State*, 494 A.2d 1265, 1269 (Del. 1985); *State v. Silva*, 75 Haw. 419, 439, 864 P.2d 583, 592 (1993); *Matthews v. State*, 839 P.2d 1215, 1220 (Idaho 1992); *State v. Mitchell*, 593 A.2d 1047, 1050 (Me. 1991); *Colvin v. State*, 299 Md. 88, 112-13, 472 A.2d 953, 965, *cert. denied*, 469 U.S. 873 (1984); *Scruggs v. State*, 484 N.W.2d 21, 24 (Minn. 1992); *State v. Courchene*, 256 Mont. 381, 389, 847 P.2d 271, 275-76 (1992); *State v. Tooher*, 542 A.2d 1084, 1086 (R.I. 1988); *State v. Larson*, 512 N.W.2d 732, 742 (S.D. 1994); *State v. Gabaree*, 149 Vt. 229, 232-33, 542 A.2d 272, 274 (1988); *Mu'min v. Commonwealth*, 239 Va. 433, 452, 389 S.E.2d 886, 898 (1990), *aff'd on other grounds*, 500 U.S.415 (1991).[3]

As the Vermont Supreme Court has noted, "This practice is in accord with the usual method of ruling on claims of ineffective assistance of counsel at both the federal level and amongst the state courts." *Gabaree*, 149 Vt. at 233, 542 A.2d at 274. Indeed, it is the practice that the Illinois Appellate Court encourages. *See People v. Flores*, 231 Ill. App. 3d 813, 827, 596 N.E.2d 1204, 1213 (1992) (stating that ineffective assistance

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[3] Indeed, apparently the only state to take the Illinois Supreme Court's extreme approach to waiver is the Supreme Court of Wyoming. *See, e.g. Kallas v. State*, 776 P.2d 198 (Wyo. 1989) (finding ineffective assistance claim waived for faiiure to raise on direct appeal even though court conceded that the claim was based on evidence outside the record); *Amin v. State*, 774 P.2d 597, 611-13 (Wyo. 1989) (Urbigkit, J., dissenting) (noting that other than the "anguished difficulties intrinsic in Illinois . . . no other jurisdiction appears anywhere with a system" that imposes such a waiver rule).

claims are "better adjudicated in proceedings on a petition for post-conviction relief"); *People v. Morris*, 229 Ill. App. 3d 144, 166, 593 N.E.2d 932, 947 (1992) (stating that it is "more appropriate" to present an ineffective assistance claim in post-conviction petition); *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990) (stating ineffective assistance claims are "more appropriately addressed in proceedings on a petition for post-conviction relief").

As the Idaho Supreme Court has summarized, "it would be anomalous . . . to hold, after directing [an] appellant that the proper way to pursue his claim was through a petition for post-conviction relief, that post-conviction relief is now barred by res judicata [or waiver]." *Carter v. State*, 108 Idaho 788, 792, 702 P.2d 826, 830 (1985). The "anomalous" Illinois decision here stands in near isolation, underscoring its fundamental unfairness and the need for this Court to grant certiorari.

II.
THE "CATCH-22" CREATED BY THE ILLINOIS RULING VIOLATES FUNDAMENTAL RIGHTS OF DUE PROCESS AND MUST BE REVIEWED BY THIS COURT

The "catch-22," as Justice McMorrow noted, created by the Illinois Supreme Court sets up an untenable hurdle for criminal defendants in which compelling evidence cannot be heard and properly considered. This is especially egregious where, as here, petitioner has been sentenced to death on the basis of what can now be demonstrated as fraudulent, inaccurate and grossly incompetent testimony. By closing off the post-conviction avenue for further claims—an avenue Illinois chose to create and must fairly administer—the decision below

impermissibly violates fundamental notions of due process that are the bedrock of our judicial system.

A. Petitioner Has A Fundamental Due Process Right To Be Heard On His Constitutional Claims

This Court has long recognized that state procedural practices are unconstitutional if they offend fundamental, deeply rooted principles of justice. *See Patterson v. New York*, 432 U.S. 197, 201-02 (1977); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). This Court has also emphasized that where interests of basic importance are involved, "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Thus, the States may not arbitrarily deny use of established adjudicatory procedures, especially where fundamental interests are present and the State has exclusive control over "'the adjustment of [the] legal relationship[s]' involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 & n.5 (1982) (quoting *United States v. Kras*, 409 U.S. 434 (1973)).

Commenting on Illinois' criminal justice system, for example, this Court has stated:

> The solicitude for securing justice [ ] embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. *A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Questions of fundamental justice protected by the Due*

> *Process Clause may be raised, to use lawyers' language, dehors the record.*

Carter v. Illinois, 329 U.S. 173, 175 (1946) (emphasis added); *see also Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment only) ("It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death.").[4]

Here, Illinois has chosen to adopt—and has defended as constitutional before this Court—a criminal appeals system that limits claims on direct appeal to those that are founded in the record. *See Carter*, 329 U.S. 173. The State has also provided for a complementary post-conviction mechanism to ensure that constitutional rights can be vindicated. *See* Post-Conviction Hearing Act, 725 ILCS 5/122-1 to 122-8 (1994). Although it may be argued that Illinois' post-conviction process is not constitutionally required, having created this process, Illinois is bound to administer it in accordance with the mandates of due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment."). Thus, this Court has previously ruled that Illinois may not apply its appellate review or state discrimination proceedings in a manner that violates federal due process. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that although appellate review

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[4] *But cf. Murray*, 492 U.S. at 10 (plurality opinion per Rehnquist, C.J.) (stating collateral proceedings not constitutionally required in capital cases); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (in non-capital context, stating that states have no obligation to provide opportunity to collaterally attack conviction but recognizing due process principles of fundamental fairness nevertheless apply).

is not required by constitution, "that is not to say that a state that does grant appellate review can do so in a way that discriminates"); *Logan*, 455 U.S. 422 (due process clause violated where state procedures effectively prevented claimant from obtaining redress for injuries).

Thus there can be no doubt but that Illinois' appellate and post-conviction procedures are subject to the strictures of the Fourteenth Amendment and cannot be administered in a way that deprives petitioner of his fundamental due process rights. *See Finley*, 481 U.S. at 557 (recognizing due process principles of fundamental fairness applied to state post-conviction proceedings but did not require appointment of counsel); *Gardner v. California*, 393 U.S. 367 (1969) (applying *Griffin* and holding Fourteenth Amendment applied to state habeas proceedings). The importance of ensuring that the Illinois courts—and indeed all courts—fairly adjudicate such rights, moreover, has been previously recognized by this Court. *See Young v. Ragen*, 337 U.S. 235, 238 (1949) ("[I]t is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right.").

B. The Illinois Supreme Court's Decision Violates Due Process By Forcing Individuals To Gamble On Which Procedural Avenue Will Vindicate Their Constitutional Rights

There is no more fundamental due process right than the opportunity to be heard, which this Court has found to be "an essential requisite of due process of law in a judicial proceeding." *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918). As this Court has recognized, "The due process clause requires that every man shall have the protection

of his day in court, and the benefit of the general law, a law that hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under protection of the general rules which govern society." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921); *see also Baldwin v. Hale*, 68 U.S. 223, 233 (1863) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.").

The Illinois Supreme Court's decision here does more than simply subvert the *Strickland* test adopted by this Court for the hearing of Sixth Amendment claims; it denies defendants the fundamental right to be heard on their constitutional claims. Under the "catch-22" created by Illinois, to avoid waiving an ineffective assistance claim, a defendant now will feel compelled to present his claim on direct appeal. If, however, the claim is based on a failure to investigate—as it is in this case—the defendant will be unable to demonstrate "what the investigation would have revealed, if the investigation had been performed." App. at 23a (McMorrow, J., dissenting); *see also People v. Williams*, 147 Ill. 2d 173, 258, 588 N.E.2d 983, 1017-18 (1991) (rejecting ineffective assistance claim on direct appeal because "the record contains no indications of what other mitigating evidence defense counsel could have introduced or argued"), *cert. denied*, 113 S. Ct. 218 (1992).

When the same defendant subsequently attempts to raise the ineffective assistance claim and present evidence in support of it in a post-conviction petition, the issue will be deemed *res judicata*. *See, e.g., People v. Emerson*, 153 Ill. 2d 100, 106-07, 606 N.E.2d 1123, 1126 (1992) (holding that ineffective

assistance claims presented in post-conviction petition and based on evidence outside the record were barred by *res judicata* because they had been raised on direct appeal), *cert. denied*, 113 S. Ct. 1865 (1993); *People v. Albanese*, 125 Ill. 2d 100, 105, 531 N.E.2d 17, 19 (1988) (holding that ineffective assistance claims presented in post-conviction petition were barred by *res judicata* because they had been raised on direct appeal), *cert. denied*, 490 U.S. 1075 (1989).

If, on the other hand, the defendant waits until the post-conviction setting to advance the ineffective assistance claim, the defendant risks waiving the issue and thus losing *any* opportunity to present the claim, as in this case.[5]

Judge Easterbrook recently summarized the fundamental unfairness of the situation as follows:

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[5] To be sure, the Illinois Supreme Court pays lip service to the general rule that a defendant may present allegations in a post-conviction petition based on evidence beyond the record on direct appeal. *See* App. at 4a-5a; *see also People v. Hall*, 157 Ill. 2d 324, 336, 626 N.E.2d 131, 136 (1993), *cert. denied*, 115 S. Ct. 507 (1994). This and other cases, however, demonstrate that the Illinois Supreme Court observes the rule in the breach. *See People v. Jones*, 155 Ill. 2d 357, 369, 614 N.E.2d 1219, 1225 (holding that defendant waived ineffective assistance based on a failure to investigate because the issue was not raised on direct appeal), *cert. denied*, 114 S. Ct. 444 (1993); *People v. Enoch*, 146 Ill. 2d 44, 54, 585 N.E.2d 115, 120 (1991) (stating that defendant's failure to raise counsel's failure to investigate "may be deemed waived by reason of failure to raise [the issue] on direct appeal"), *cert. denied*, 113 S. Ct. 57 (1992); *People v. Silagy*, 116 Ill. 2d 357, 369, 507 N.E.2d 830, 835 (holding that defendant waived counsel's failure to introduce mitigating factors at sentencing because the issue was not raised on direct appeal), *cert. denied*, 484 U.S. 873 (1987); *People v. Jones*, 109 Ill. 2d 19, 23-24, 485 N.E.2d 363, 364 (1985) (same), *cert. denied*, 475 U.S. 1090 (1986). The arbitrariness of the Illinois Supreme Court's approach only compounds its error and increases the need for review by this Court.

> Lawyers who raise ineffective-assistance claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution. Lawyers who do *not* raise ineffective-assistance claims on direct appeal create a risk that the court will deem the contention forfeited . . . .

Guinan, 6 F.3d at 476 (Easterbrook, J. concurring) (emphasis in original). Justice McMorrow's dissent below excoriated the majority's opinion for creating this same dilemma:

> The majority's waiver decision will be especially confusing for the criminal trial bar, the trial courts, and our courts of review. In light of the majority's ruling, one is left to speculate, in uncertainty, whether a claim of perjured testimony, and ineffective assistance of trial counsel, must always be presented in the defendant's direct appeal, regardless of whether the evidence supporting the argument derives from matters outside the appellate record. The majority performs a grave disservice in its lack of clear insight or guidance on these matters.
>
> Illinois once had a well-publicized reputation for having devised post-conviction requirements that created a "procedural labyrinth *** made up entirely of blind alleys" (*Marino v. Ragen* (1947), 332 U.S. 561, 567, 92 L. Ed. 170, 175, 68 S. Ct. 240, 244 (Rutledge, J., concurring)) that effectively insulated the court from ruling on the merits of a defendant's constitutional challenges to his criminal conviction and sentence. Our Post-Conviction Hearing Act was adopted in 1949 to overcome these shortcomings. (See generally Leighton, *Post-Conviction Remedies in Illinois Criminal Procedure*, 1966 Ill. L.F. 540, 568-71.) Unfortunately, the majority's decision harkens back to this earlier era, when technical rules of procedure were

> manipulated in order to avoid or preclude substantive review of the criminal defendant's constitutional arguments.

(App. at 24a (McMorrow, J., dissenting).)

In this case, petitioner had no opportunity to mount a constitutional challenge on direct appeal because crucial evidence was missing, as demonstrated by the Illinois Supreme Court's own opinion on direct appeal, which concluded *on the basis of the record before it* that Weliczko's testimony did not so prejudice petitioner so as to mandate the granting of a continuance to locate a qualified expert. (App. at 95a.) Now that petitioner has the requisite evidence, his claim is deemed waived. This leaves petitioner with *no* opportunity to be heard on his Sixth Amendment claims. Petitioner had a right to present *all* the evidence in support of his ineffective assistance claim at one time, not to have the evidence parsed for hearing into two categories—neither one itself sufficient to state a claim—depending on whether the fact was "in" or "outside of" the record on appeal.

III.
SUPREME COURT REVIEW IS NECESSARY TO UPHOLD CONSTITUTIONAL STANDARDS GOVERNING CAPITAL SENTENCES IMPOSED ON THE BASIS OF MATERIALLY INACCURATE INFORMATION

This Court has recognized that the "fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quoting *Gardner v. Florida*, 430

U.S. 349, 363-64 (1977)). The Illinois decision displays a callous indifference to the reliability of petitioner's capital sentence by failing to consider the effect of Weliczko's materially inaccurate testimony on the constitutionality of the trial court proceeding.

A. The Trial Court's Consideration Of Weliczko's False And Inaccurate "Psychological" Analysis Violated Petitioner's Right Not To Be Sentenced On Materially Inaccurate Information

Presented with petitioner's claim that his sentencing proceeding was unconstitutional because it relied on materially inaccurate information, the majority summarily disposed of the matter, finding the claim meritless because Weliczko was not a witness for the State. (App. at 3a.) The Eighth Amendment's concern for reliability, however, does not rise and fall on the *source* of evidence that makes a decision uncertain. The determinative issue, rather, is whether the death sentence was based, in whole or in part, on evidence that has been revealed to be materially inaccurate. *See Johnson v. Mississippi*, 486 U.S. at 585.

As recognized by Justice McMorrow, the facts and evidence adduced in the petition clearly made a prima facie showing that satisfied this standard. The sentencing judge both admitted and relied on Weliczko's fraudulent analysis. (App. at 14a (McMorrow, J., dissenting).) Evidence not available on direct appeal and presented in the petition, moreover, has shown this analysis to be "wholly inadequate, grossly inaccurate, and contain[ing] an utterly erroneous psychological evaluation of [petitioner]." (App. at 17a.)

B. Petitioner's Sentencing Hearing Denied Him A Right To A Competent Psychiatric Evaluation Untainted With Perjury

Ake v. Oklahoma, 470 U.S. 68 (1985), guarantees to a defendant in a capital sentencing proceeding access to a psychiatric examination in cases where the state has presented psychiatric evidence of future dangerousness. This Court in *Ake*, holding that constitutional protection turned on "the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence," found that a defendant without such assistance faces significant difficulties in a sentencing proceeding. *Id.* at 83-84; *cf. Brown v. Dodd*, 484 U.S. 874 (1987) (Marshall, J. dissenting from denial of certiorari) (arguing that *Ake*'s right to psychiatrist is analogous to right to counsel and defendant should have relief when assistance is ineffective); *Harris v. Vasquez*, 901 F.2d 724, 726 (9th Cir. 1990) (remanding case for hearing on whether psychiatrist's performance at hearing was incompetent); *State v. Sireci*, 536 So. 2d 231, 233 (Fla. 1988) (granting new sentencing hearing where psychiatrists failed to diagnose brain disorder). This Court has also repeatedly recognized that relief is appropriate where a conviction is obtained based on perjured testimony. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Although Weliczko was impeached on the stand during the course of petitioner's sentencing hearing, his opinions as a "psychotherapist" still had sufficient indicia of reliability to be considered by the trial court and to allow the State to present the testimony of a psychiatric expert in "rebuttal." It was not until his post-conviction petition that petitioner was able to show the full extent of Weliczko's fraud on the court and the fact that his opinions were wholly incompetent. Under these circum-

stances, this Court's rulings concerning the need for competent psychological evaluation and on the effect of perjury serve to emphasize the fundamental unfairness of petitioner's sentencing hearing and the need of this Court to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, petitioner Paul S. Erickson respectfully asks that a writ of certiorari be granted in this cause.

Respectfully submitted,

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Dated: February 2, 1995

APPENDIX

Docket No. 72667—Agenda 2—January 1994.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,

v.

PAUL S. ERICKSON, Appellant.

JUSTICE FREEMAN delivered the opinion of the court:

After waiving the jury that had convicted him, defendant was sentenced to death for raping Elizabeth Launer, murdering her, and concealing the homicide. This court affirmed the convictions and sentence on direct appeal. (*People v. Erickson* (1987), 117 Ill. 2d 271). After the United States Supreme Court declined review (*Erickson v. Illinois* (1988), 486 U.S. 1017, 100 L. Ed. 2d 216, 108 S. Ct. 1754), defendant pursued, unsuccessfully, post-conviction relief (Ill. Rev. Stat. 1989, ch. 38, par. 122—1) in the circuit court of Cook County. Defendant appeals the dismissal of his petition for that relief (134 Ill. 2d R. 651(a)), seeking, alternatively, remand for an evidentiary hearing on it or a new sentencing hearing.

We affirm.

As this court's earlier opinion summarizes the circumstances of the convictions and sentence, only the facts necessary to understand the issues raised are noted.

THE TESTIMONY OF JOHN WELICZKO

After learning of the charges against their son, defendant's parents sought out, for themselves, the professional counseling services of John Weliczko. (See *Erickson*, 117 Ill. 2d at 285.) Weliczko eventually extended his services to the defense, testifying as the sole witness on defendant's behalf during the sentencing phase of the trial.

It was intended that Weliczko would give his opinion as a mental health expert that a psychological condition explained defendant's criminal behavior. (See Ill. Rev. Stat. 1989, ch.

38, par. 9—1(c)(2); *Erickson*, 117 Ill. 2d at 285, 301.) Weliczko did testify as to what might have accounted for defendant's acts. But he did so as a lay person, the trial judge having refused to qualify him as an expert. See *Erickson*, 117 Ill. 2d at 285, 301.

There was good reason for this. In relating his credentials, Weliczko had stated that he held a masters degree in psychology from Harvard University and a doctorate in the field from the University of Chicago. Weliczko, in fact, was not trained in psychology.

Cross-examined about his background, Weliczko admitted the Harvard masters degree was in theology. As for the doctorate, it was a ministry degree in pastoral counseling and psychology. Further, the degree-granting institution was not the University of Chicago but the Chicago Theological Seminary, an entity affiliated with the university.

Weliczko did manage to offer that he practiced psychotherapy, and, therefore, was, like a licensed psychologist, recognized to be a mental health care provider. He stated that, like a psychologist, a psychotherapist could evaluate a person and arrive at "somewhat the same conclusions" about the person's mental health. For those reasons, it appears, the trial judge considered Weliczko's opinion, albeit as a lay person, and accepted into evidence his written "psychological" evaluation of defendant. See *Erickson*, 117 Ill. 2d at 301.

Defendant now complains Weliczko's testimony denied him a fair death penalty hearing. He cites guarantees of the sixth, eighth, and fourteenth amendments of the United States Constitution (U.S. Const., amends. VI, VIII, XIV) as well as unspecified protections of the Illinois Constitution. Defendant also directs attention to decisions decrying the use of perjured testimony. See, *e.g.*, *People v. Cornille* (1983), 95 Ill. 2d 497

(allowing post-conviction relief where the State's expert witness lied about his academic scholarship and achievements).

The misrepresentation of professional credentials would be a serious concern but for the fact that Weliczko was retained by, and testified for, the defense, not the State. But the claim is even more fundamentally flawed: whatever effect Weliczko's testimony might have had was apparent when his credentials were challenged on cross-examination. The opportunity to take issue with Weliczko's testimony was therefore on direct appeal, not in a collateral attack in a post-conviction proceeding.

Failure to raise a claim which could have been addressed on direct appeal is a procedural default which results in a bar to consideration of the claim's merits in a post-conviction proceeding. (*People v. Albanese* (1988), 125 Ill. 2d 100, 104-05.) Excused in limited circumstances (see *People v. Flores* (1992), 153 Ill. 2d 264, 274), the result of a procedural default forces acknowledgment of a conviction's finality, an elemental concern in any such proceeding (see *People v. Free* (1988), 122 Ill. 2d 367, 378).

Defendant attempts to skirt the procedural bar under an exception which looks to matters which were not a part of the record on direct appeal. He points to a copy of Weliczko's transcript from the Chicago Theological Seminary and an affidavit of an official at Gordon College in Wenham, Massachusetts, which shows Weliczko earned a degree in philosophy there.

Defendant concedes the State debunked Weliczko's assertion that he was a psychologist. But he insists a different injurious "perjury" is shown by the affidavit and documents: that is, Weliczko lied about actually holding a degree in the field of psychology.

The argument glosses over the reason why the procedural bar properly may be relaxed given matters outside the trial record. The bar normally reaches to all matters that could have been—not merely were not—earlier raised. Thus, the mere fact that support for a claim is contained in papers not in the trial record is largely immaterial. Reason to relax the bar occurs only when what is offered in the papers also explains why the claim it supports could not have been raised on direct appeal.

For example, the default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense. (See generally *People v. Hall* (1993), 157 Ill. 2d 324, 336-37; *People v. Kokoraleis* (March 31, 1993), No. 72862; *People v. Owens* (1989), 129 Ill. 2d 303, 308-09; see also *Perry v. Fairman* (7th Cir. 1983), 702 F.2d 119, 122 (collecting Illinois appellate cases).) An ineffective-assistance claim based on what the record on direct appeal discloses counsel did, in fact, do is, of course, subject to the usual procedural default rule. (See *People v. Kokoraleis* (March 31, 1994), No. 72862.) But a claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation. But see *People v. Jones* (1985), 109 Ill. 2d 19, 23 (barring consideration of a claim of counsel's ineffectiveness for not presenting evidence which was included in the trial record).

There is nothing in the content of the affidavit and documents here offering more than what is evident from the record itself. The issue of prejudice resulting from Weliczko's testimony could have been raised on direct appeal based on the testimony elicited during the sentencing hearing. Weliczko had admitted that his academic background was in theology

and ministry and that, in fact, he was not a psychologist. The admissions were fixed in the record as a result of the cross-examination. The affidavit and documents reveal no more than Weliczko's own testimony. Finding no reason to excuse the procedural default, defendant's claim must be dismissed.

ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE

Defendant claims his counsel's representation was so deficient at the sentencing phase of trial that the process failed. Although its basis is not identified, such a claim is rooted in protections of the sixth and fourteenth amendments of the United States Constitution. (See U.S. Const., amends. VI, XIV; *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052.) It should be noted that counsel who represented defendant at sentencing did not represent him on direct appeal or in the post-conviction proceeding.

Defendant asserts several grounds independently support his claim. Two relate directly to Weliczko's testimony. Defendant first points to the failure to verify Weliczko's credentials. He then argues that proffering Weliczko's testimony actually undermined the defense strategy.

Neither point may now be considered. Again, defendant's opportunity to raise those arguments was on direct appeal. Any inadequacy there may have been with counsel's representation with respect to Weliczko was evident when Weliczko was cross-examined. Defendant failed to take issue with that representation on direct appeal and so is procedurally barred from doing so here (*People v. Albanese*, 125 Ill. 2d at 104-05) absent some exception. We find none.

Defendant next asserts counsel failed to independently investigate and present other mitigating evidence, including a competent psychological profile. Defendant argues that that

evidence would show he had endured a childhood of psychological, emotional, and sexual abuse and that he had a history of alcohol and drug addiction. Defendant points to reports of two psychologists which recount that background in confirming it could explain defendant's acts. One adds the factor of head injury. Defendant also points to affidavits from two former teachers. They offer that defendant was a well-adjusted student and that news of his involvement in the crimes came as a shock.

The ever present duty of independent investigation in a criminal defense effort (see *United States v. Decoster* (D.C. Cir. 1979), 624 F.2d 196, 209-10) is to be judged using a standard of reasonableness in light of all circumstances presented (*Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 695, 104 S. Ct. at 2066). Reasonableness is to be determined by considering the informed strategic choices of, as well as the information supplied by, the defendant. *Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 695-96, 104 S. Ct. at 2066.

Initially, then, it bears noting that Weliczko, who, it must be remembered, was retained by defendant's own parents, had already generated a "psychological" evaluation. Ignoring, as would be proper in separately analyzing this issue, that an ineffectiveness claim for not verifying Weliczko's training in psychology is barred, the evaluation's existence would seem reason enough to dismiss the claim that counsel was ineffective for not having obtained another. The State suggests just such a disposition. But defendant's argument fails substantively as well.

Courts may resolve ineffectiveness claims against the two-part test of *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, reaching only the prejudice component, for lack of prejudice renders irrelevant

the issue of counsel's performance. (*People v. Albanese* (1984), 104 Ill. 2d 504, 525-27, adopting *Strickland*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052.) That involves looking at the findings unaffected by error, accounting for the effect of error on remaining findings, and answering, in the end, whether the decision would "reasonably likely" have been different. (*Strickland*, 466 U.S. at 695-96, 80 L. Ed. 2d at 698-99, 104 S. Ct. at 2068-69.) The assessment "must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" (*Strickland*, 466 U.S. at 695, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068)—an important observation given that, in this State, the sentencer could have elected to preclude the death penalty for any reason found to be sufficiently mitigating (Ill. Rev. Stat. 1989, ch. 38, par. 9—1(h)). Just as importantly, the assessment may include "evidence about the actual process of decision" if that evidence is a part of the record of the proceedings being reviewed. *Strickland*, 466 U.S. at 695, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068.

The unaffected findings show that defendant, then 25 years old, enlisted the aid of two juveniles to methodically chart a plan to isolate, bind, and gag a 15-year-old girl for purposes of raping her, stabbing her to death, and, in the end, concealing the corpse. (See *Erickson*, 117 Ill. 2d at 279-83.) For those crimes, defendant was remorseless. He bragged about the stabbing immediately after the deed. He boasted of the crimes days after and even did so much later when detained in a county jail awaiting trial. Other aggravating evidence, including the commission of another rape at knife point and a third threatened one, attests to some pattern of sexual assault against women.

Any laxity of counsel notwithstanding, what is offered to bolster the ineffectiveness claim does not show the result

would "reasonably likely" have been different, excluding the possibility of arbitrariness. Briefly, the psychologists' reports could, at best, only suggest what may have explained defendant's criminal behavior of July of 1982. The evaluations were produced years after the crimes and, apparently, without the aid of the trial record, which revealed, through witnesses' testimony, defendant's actual behavior. The affidavits of the teachers, one from fourth grade and one from high school, disclose that neither maintained close contact with defendant after he left their respective classrooms. And, if anything, they show defendant to be polite, intelligent, and engaging, not a person troubled by a disturbed psyche which might account for his criminal behavior.

The record is also revealing as to the process of decision, underscoring the lack of prejudice which might have been occasioned by any deficiencies of counsel. The trial judge, who defendant elected to impose sentence, actually took into account the notion that defendant may have suffered from a personality disorder. In addition, the trial judge noted that a presentencing investigation report on defendant revealed a background free of what might be normally encountered given the nature of the crimes. It would appear, then, that the trial judge on his own considered, and rejected, the gist of what defendant hoped the evidence might show.

Defendant raises two other issues, tangentially related to claims of ineffectiveness addressed above, insisting each supports the need for an evidentiary hearing on the petition.

Defendant claims the judge who ruled on the post-conviction petition did so improperly by guessing at how the original trial judge, who recused himself, would have ruled in light of the evidence defendant claims should have been presented.

Both defendant's post-conviction counsel and the State conceded that the judge ruling on defendant's petition could do so after reviewing the trial transcript and other evidence in the record. The judge stated that he did, indeed, review the entire record and that he, himself, not the trial judge, found the petition to be without merit. The judge did refer to the original trial judge by name, stating he reviewed the materials supporting defendant's petition just as the sentencing judge would have had the materials been presented in mitigation. A fair reading of those remarks, however, does not show that the judge evaluated defendant's petition in any way other than as defense counsel and the State conceded would be the only way possible. No prejudice is found here.

Finally, defendant notes that his parents had executed a promissory note for the balance of fees for counsel's representation. Ultimately, counsel sued to collect on the note. Defendant now theorizes that the failure to obtain a competent psychological profile may have been due to a reluctance to incur additional costs. If so, defendant reasons, the conflict contributed to counsel's ineffectiveness.

The record answers any speculation as to why counsel did not seek out a psychological profile in addition to Weliczko's evaluation. The reasons are not as defendant suggests. Surprised by Weliczko's disclosure of his true background on cross-examination, counsel sought a continuance of the hearing to obtain an "acceptable" evaluation. (See *Erickson*, 117 Ill. 2d at 301.) That request, though denied (see *Erickson*, 117 Ill. 2d at 301-02), would be inconsistent with a reluctance to incur additional expense on defendant's behalf. Further, as earlier noted, an evaluation of defendant had already been generated. Without reason to doubt Weliczko's competency, the evaluation's existence, not conjecture about preoccu-

pation with collecting fees, explains the failure to produce another.

REFUSAL TO GRANT CONTINUANCE

Defendant asserts he is entitled to an evidentiary hearing for reasons related to the refusal of a continuance to produce a competent psychological evaluation. But the same argument was raised, and rejected, on direct appeal. (*Erickson*, 117 Ill. 2d at 301-02.) The matter cannot be relitigated in a post-conviction proceeding under principles of *res judicata*. *People v. Del Vecchio* (1989), 129 Ill. 2d 265, 284; *Albanese*, 125 Ill. 2d at 104-05, citing *People v. Silagy* (1987), 116 Ill. 2d 357, 365.

WAIVER OF JURY FOR SENTENCING

Defendant claims he waived the jury for the sentencing phase without knowing that if even one juror voted to spare his life a death penalty was impossible. (See Ill. Rev. Stat. 1989, ch. 38, par. 9—1(h).) But, in fact, defendant answered affirmatively when the trial judge asked if he understood that, like the finding of guilt, death had to be the jury's unanimous choice, meaning that all 12 jurors had to agree on the penalty. Nevertheless, defendant states that had he better understood the unanimity requirement, he would not have waived the jury for sentencing.

Defendant concedes that on direct appeal he argued, without success, that the judge's admonishment was insufficient. (See *Erickson*, 117 Ill. 2d at 295-96.) However, he insists a different issue is raised here: whether an evidentiary hearing is required because he generated a sworn statement revealing he did not truly understand the unanimity requirement.

It is difficult to see how that different characterization of the issue might change the nature of the claim. The underlying question remains whether there was a knowing,

intelligent, and voluntary waiver of the right to a jury for sentencing purposes. That question was answered positively on direct appeal. See *Erickson*, 117 Ill. 2d at 295-96; see also *People v. Ramey* (1992), 152 Ill. 2d 41, 59-60 (holding that knowledge of the unanimity requirement is immaterial to assessment of whether a defendant's waiver of a jury for sentencing is valid).

Presumably, defendant's argument is that the waiver could not have been knowing or intelligent if, despite understanding that all 12 jurors had to agree on death, he stood unenlightened of the implication that a lone juror could block it. But if the admonishment was sufficient, and it was, and defendant understood its meaning, and he said he did, it can matter little that he now swears he was ignorant of a nuance he now realizes. Defendant's answer for the record that he understood the admonishment belies the assertion that he did not really understand the workings of the unanimity rule. There is no need for an evidentiary hearing on the issue.

WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION

Defendant elected to testify during the guilt phase of trial. He now complains he did so only because counsel had rhetorically asked whether defendant "would like to go to prison for many years" without "having *** told his story." Defendant does not assert that he was not aware of his right not to testify. He argues only that counsel's question was tantamount to coercion because it assured a conviction unless defendant did so.

Given the realities of this case, the question is more reasonably characterized as advice defense counsel would be expected to have imparted to defendant. Defendant's own testimony was, in fact, the sum and substance of his defense. No other

evidence was offered to counter the considerable case the State assembled, which included testimony from the other criminal participants.

CHALLENGE TO THE ILLINOIS DEATH PENALTY SCHEME

Defendant last attacks the constitutionality of the death penalty scheme. Specifically, defendant focuses on the requirement that death will be imposed absent mitigation sufficient to preclude it. Defendant also argues the statute does not provide defendants with a right to discovery. The arguments were rejected, respectively, in *People v. Strickland* (1992), 154 Ill. 2d 489, 538-40, and *People v. Foster* (1987), 119 Ill. 2d 69, 101-03. We decline to reconsider those conclusions.

For the reasons above, we affirm the judgment of the circuit court. We direct the clerk of this court to enter an order setting Tuesday, November 15, 1994, as the date on which the sentence of death, entered by the circuit court of Cook County, shall be carried out. Defendant shall be executed in the manner provided by law. (Ill. Rev. Stat. 1991, ch. 38, par. 119—5.) The clerk of this court shall send a certified copy of this mandate to the Director of Corrections, to the warden of Stateville correctional Center, and to the warden of the institution where defendant is now confined.

Affirmed.

JUSTICE McMORROW, dissenting:

I dissent because I believe the defendant is entitled to an evidentiary hearing to prove his allegations of ineffective assistance of counsel; defendant should not be barred from proving his allegations under the doctrine of waiver.

The defendant's post-conviction petition raises a serious allegation that his trial counsel was ineffective because he failed to discover Weliczko's allegedly fraudulent and perjured misrepresentation that Weliczko was a trained mental health provider qualified to testify regarding whether defendant suffered from a substantial emotional or mental disability. This alleged ineffectiveness was compounded by the attorney's alleged failure to investigate and present the testimony of truly qualified mental health experts who could have provided critical mitigating evidence to support defendant's claim that he should be spared the death sentence because he suffered from a substantial mental disturbance.

The defendant's theory of defense at his death sentence hearing was that he suffered from a severe emotional or mental disturbance at the time of the offenses. Defendant's sole witness in his behalf was John Weliczko, who represented on direct examination that he was a psychologist. On cross-examination, Weliczko admitted that he was not a psychologist and that he had not been wholly forthright on direct examination with respect to his credentials. However, Weliczko maintained that he was a "psychotherapist" and that he had substantial training, background, and experience as a mental health provider.

Prior to the sentencing hearing, defendant's trial counsel thought that Weliczko was a qualified psychologist. It was only at the sentencing hearing that defense counsel learned that Weliczko was not a psychologist.

In view of Welizcko's admissions during the defendant's sentencing hearing, the trial court was aware that Weliczko had not been completely truthful with respect to his credentials as a mental health provider. Although the trial court did not recognize Weliczko as an "expert," the trial court nonetheless believed that Weliczko was a psychotherapist who could provide

an opinion useful to the court at the sentencing hearing. As a result, the trial court admitted Weliczko's testimony into evidence and relied on Weliczko's psychological evaluation of the defendant in deciding whether to impose the death sentence.

However, according to the defendant's post-conviction petition, what the trial court and the defendant's trial counsel did not know was that Weliczko had no training, background, or *bona fide* experience in psychology whatsoever. In addition, the defendant's post-conviction petition indicates that the trial court and defendant's trial counsel did not know that Weliczko's psychological assessment and evaluation of the defendant was utterly unreliable. Moreover, affidavits of qualified mental health providers, as attached to the defendant's post-conviction petition, support defendant's claim that he suffered from a significant mental disturbance. These affidavits further indicate that Weliczko's report contained a completely erroneous and incompetent psychological evaluation of the defendant.

The majority is incorrect to hold that defendant's challenges to Weliczko's testimony are waived. The claims are not waived, because they raise new arguments based on new evidence that was not part of the record from defendant's direct appeal. The majority is also wrong when it finds that defendant was not prejudiced by the absence of the additional psychological evidence presented in support of defendant's post-conviction petition. Whether defendant's allegations of ineffective assistance of counsel are sufficient to satisfy the standard of *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, must be determined following an evidentiary hearing, and cannot lawfully be determined on an appeal from the trial court's dismissal of the post-conviction petition prior to evidentiary hearing.

For these reasons, I disagree with the majority's refusal to grant defendant an evidentiary hearing with respect to his allegation that he was deprived of the effective assistance of counsel at his death sentence hearing.

I. Waiver of Challenges to Weliczko's Testimony

The majority refuses to consider whether the failure of defendant's trial counsel to learn that Weliczko lacked any credentials or experience in the mental health field may have deprived defendant of the effective assistance of counsel. The majority claims that the "defendant's opportunity to raise" an argument regarding defense counsel's failure "to verify Weliczko's credentials" arose "on direct appeal." (Slip op. at 4.) The majority offers that "[a]ny inadequacy there may have been with counsel's representation with respect to Weliczko was evident when Weliczko was cross-examined." (Slip op. at 4.) The majority concludes that defendant "failed to take issue with that representation on direct appeal and so is procedurally barred from doing so here [citation] ***." Slip op. at 4; see also slip op. at 3.

I disagree with the majority on this issue. The defendant's argument of ineffective assistance of counsel with respect to the Weliczko testimony is not waived, because the pertinent evidence on this issue, presented by the defendant in his post-conviction petition, is evidence that does not appear in the record of his trial court proceedings. Also, this new evidence supports an argument the defendant did not make and could not make on direct appeal: that Weliczko's testimony was fraudulent and perjured because Weliczko had no *bona fide* training, experience, or background in psychology that would warrant introduction of his report and opinions.

To justify its finding of waiver, the majority minimizes the nature of the defendant's claim, reasoning as follows:

> "There is nothing in the content of the affidavit and documents here offering more than what is evident from the record itself. The issue of prejudice resulting from Weliczko's testimony could have been raised on direct appeal based on the testimony elicited during the sentencing hearing. Weliczko had admitted that his academic background was in theology and ministry and that, in fact, he was not a psychologist. The admissions were fixed in the record as a result of the cross-examination. The affidavit and documents reveal no more than Weliczko's own testimony. Finding no reason to excuse the procedural default, defendant's claim must be dismissed." Slip op. at 4.

However, defendant does offer more than what was evident from the appellate record. Defendant alleged two glaring falsities in Weliczko's trial testimony. First, Weliczko testified on cross-examination that he earned a doctorate degree in counseling psychology from the Chicago Theological Seminary. According to defendant's post-conviction petition, Weliczko did not receive a degree in counseling psychology; he received a doctor of ministry degree. Second, Weliczko testified at the sentencing hearing that he earned a B.S. degree in psychology and philosophy from Gordon College. According to defendant's post-conviction petition, Weliczko did not receive a B.S. degree in psychology and philosophy; he received a B.A. degree in philosophy. Consequently, contrary to Weliczko's trial testimony, Weliczko allegedly did not have the education, background, or training in psychology to qualify him to provide a psychological evaluation of the defendant.

The new evidence submitted in support of defendant's post-conviction went far beyond the revelations to which Weliczko admitted when he testified at the defendant's sentencing hearing. The record reveals that the trial court ad-

mitted Weliczko's opinion based upon the trial court's allegedly mistaken belief that Weliczko was a qualified psychotherapist, whose opinion regarding defendant's mental and emotional condition could aid the court in its decision whether to impose the death penalty. Contrary to the impressions of the trial court, however, Weliczko allegedly was not a qualified mental health provider, and his opinion was therefore of no genuine value to the trial court. According to defendant's post-conviction petition, the trial court erroneously relied upon Weliczko's evaluation of the defendant, although that evaluation allegedly was an incompetent and grossly inaccurate assessment of the defendant's mental and emotional condition. Defendant's post-conviction petition alleged that the report prepared by Weliczko "does not constitute a competent psychiatric evaluation report" because it "deviates significantly from what is customarily found in a competent psychiatric report in a number of ways." Defendant offered the affidavits of qualified mental health professionals, who stated that Weliczko's report was wholly inadequate, grossly inaccurate, and contained an utterly erroneous psychological evaluation of the defendant.

The psychological evaluations offered in support of defendant's post-conviction petition indicated that defendant had been raised in a troubled and dysfunctional family and suffered from neurological deficit caused by several head injuries and years of polysubstance abuse. In comparison, Weliczko testified that defendant suffered from a personality disorder, and made no reference to defendant's trouble childhood, dysfunctional family and upbringing, or defendant's suffering from neurological damage or substance abuse.

It is also noteworthy that in his post-conviction petition, defendant submitted various documents relating to a Federal prosecution in which Welizcko plead guilty to bank fraud.

Memoranda written by attorneys in the United States Attorney's office indicate that Weliczko had a pattern of defrauding individuals and companies, and noted his false testimony in the instant cause as an example of this pattern of behavior. The evidence of Weliczko's pattern of fraud and perjury was not presented to the trial court at defendant's death sentence hearing.

Given the evidence submitted in support of defendant's post-conviction petition, it is difficult to discern a lawful basis for the majority's decision to find that defendant has waived his ineffective-assistance-of-counsel argument. The majority wholly ignores that the defendant's arguments, with respect to the failure to investigate and present evidence that Weliczko had no credentials to provide any testimony regarding a psychological profile of the defendant, relies upon evidence *outside the record of the defendant's direct appeal*. As such, the defendant's arguments, which relied upon this evidence, could not have been raised in his direct appeal, and are not waived in defendant's post-conviction proceeding. In *People v. Hall* (1993), 157 Ill. 2d 324, this court stated:

> "Defendant *** contends that his trial counsel failed to provide effective assistance during the death sentence hearing ***. [Citation.] Defendant claims that his trial counsel failed to present, or even investigate, meaningful mitigation evidence.
>
> The State initially responds that defendant has waived this issue in this post-conviction appeal by failing to raise it on direct appeal. It is true that where a post-conviction petitioner has previously taken a direct appeal from a judgment of conviction, issues that could have been presented on direct appeal but were not are deemed waived. *People v. Flores* (1992), 153 Ill. 2d 264, 274; *People v. James* (1970), 46 Ill. 2d 71, 74.

> *However, defendant's post-conviction claim relies on affidavits of several alleged mitigating witnesses. Those affidavits were not part of the record on direct appeal. Thus, defendant could not have raised the issue in his direct appeal. Accordingly, the issue is not waived in a post-conviction proceeding. Eddmonds*, 143 Ill. 2d at 528; *People v. Owens* (1989), 129 Ill. 2d 303, 308-09 (Emphasis added.) *Hall*, 157 Ill. 2d at 336-37.

In light of this reasoning in *Hall*, the defendant in the instant case cannot be barred, under the doctrine of waiver, from raising the argument that his trial counsel was ineffective for failing to investigate and introduce evidence that is not found in the record of the defendant's direct appeal.

The majority's decision is particularly disturbing and troubling because it needlessly and wrongfully conflicts with clear, unambiguous, and respected precedent of this court. For example, in *People v. Eddmonds* (1991), 143 Ill. 2d 501, and *People v. Owens* (1989), 129 Ill. 2d 303, the waiver doctrine was not applied because the evidence relied upon by the defendants did not appear in the record of their direct appeals. In both of the decisions, this court held that a defendant is permitted to present, in post-conviction petitions, allegations based on matters that could not have been presented in a direct appeal, because they arose outside the scope of the trial court's original proceedings. This long-standing rule has been recognized in other decisions of this court as well as our appellate court. See *Eddmonds*, 143 Ill. 2d at 528; *Owens*, 129 Ill. 2d at 308-09; *People v. Wright* (1986), 111 Ill. 2d 18, 25-26; *People v. Gaines* (1984), 105 Ill. 2d 79, 91; *People v. Stepheny* (1970), 46 Ill. 2d 153, 155; *People v. Thomas* (1967), 38 Ill. 2d 321, 324-25; *People v. Heartfelt* (1992), 232 Ill. App. 3d 198, 204; *People v. Davis* (1990), 203 Ill. App. 3d 129, 139;

People v. Lee (1989), 185 Ill. App. 3d 420, 427; *People v. Taylor* (1988), 165 Ill. App. 3d 1016, 1019; *People v. Mitchell* (1987), 163 Ill. App. 3d 1007, 1009; *People v. Cobb* (1986), 150 Ill. App. 3d 267, 270; *People v. Nix* (1986), 150 Ill. App. 3d 48, 51; *People v. Carroll* (1985), 131 Ill. App. 3d 365, 367; *People v. Edsall* (1981), 94 Ill. App. 3d 469, 472-73; *People v. Mengedoht* (1980), 91 Ill. App. 3d 239, 241; *People v. Edwards* (1980), 83 Ill. App. 3d 128, 131; *People v. Turner* (1979), 74 Ill. App. 3d 840, 844; *People v. Owsley* (1978), 66 Ill. App. 3d 234, 237; *People v. Hudson* (1978), 65 Ill. App. 3d 422, 424; *People v. Summers* (1977), 50 Ill. App. 3d 33, 35; *People v. Dennis* (1973), 14 Ill. App. 3d 493, 495; see also *People v. Johnson* (1993), 154 Ill. 2d 227; *People v. Jones* (1985), 109 Ill. 2d 19, 23-24; *People v. Myers* (1970), 46 Ill. 2d 270, 271.

Most recently, in *People v. Thompkins* (May 26, 1994), No. 72827, this court again acknowledged and reaffirmed that there is a valid and important distinction between ineffective-assistance-of-counsel arguments that are waived because the arguments rely upon matters presented at trial, and ineffective-assistance-of- counsel arguments that are not waived for post-conviction review because the arguments present additional matter not found in the record of the trial court proceedings. The majority's contrary result in the instant cause is patently unfounded in legal precedent of this court.

The majority's waiver analysis in the present case is also untenable, because its reasoning has been rejected or disavowed by several Federal courts of appeal. In *Guinan v. United States* (7th Cir. 1993), 6 F.3d 468, the Seventh Circuit Court of Appeals adopted precedent, particularly with respect to preserving an ineffective-assistance-of-counsel argument for

post-conviction review, that is similar to the precedent of this court which the majority now tacitly overrules. The Seventh Circuit has held that "if a defendant postpones raising the issue of ineffective assistance of counsel until the collateral stage he must have a valid reason for the postponement ***." (*Guinan*, 6 F.3d at 472.) According to the court, one "valid reason" for postponement is that the ineffective-assistance-of-counsel claim required proof of facts outside the record of the direct appeal. (*Guinan*, 6 F.3d at 472.) In a concurring opinion, Judge Easterbrook noted that "[t]hree [Federal] courts of appeals have held that ineffective-assistance claims are forfeited when not presented on direct appeal" and that the "Solicitor General has confessed error on all three" cases once petitions for writ of *certiorari* were filed before the United States Supreme Court (*Guinan*, 6 F.3d at 475, citing *Billy-Eko v. United States* (2d Cir. 1992), 968 F.2d 281, *vacated on confession of error* (1993), __ U.S. __, 125 L. Ed. 2d 685, 113 S. Ct. 2989; *Chappell v. United States* (7th Cir. 1989), 878 F.2d 384, *vacated on confession of error* (1990), 494 U.S. 1075, 108 L. Ed. 2d 931, 110 S. Ct. 1800; *Diaz-Albertini v. United States* (10th Cir. 1990) (unpublished), *vacated* (1991), 498 U.S. 1061, 112 L. Ed. 2d 839, 111 S. Ct. 776).

In his concurring opinion in *Guinan*, Judge Easterbrook also made the following cogent observations:

> "Like my colleagues, I yearn for a system under which one appeal resolves the entire case. Unfortunately, ineffective assistance of counsel eludes once- and-for-all disposition. Trial counsel cannot be expected to attack his own performance, and a new lawyer representing the defendant on appeal finds that it is impossible to upset a conviction by pointing to his predecessor's actions. Why impossible? Because the absence of a complete record

prevents definitive action. No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did. [Citations.] Or it may turn out that counsel's overall performance was sufficient despite a glaring omission, or that the shortcoming did not prejudice the defendant. [Citations.] The trial judge is best situated to assess overall performance and prejudice, yet a claim of ineffective assistance presented on direct appeal asks the court of appeals to act without the [trial] judge's views. ***

Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time. For ineffective assistance of counsel, the court of appeals on direct appeal is the wrong tribunal at the wrong time. *** Failure to call essential witnesses might show both deficient performance and prejudice, but on direct appeal all we will have is defendant's say-so that an uncalled witness was critical. To have any hope of success, the defendant must enlarge the record with affidavits establishing what testimony the witness would have provided if called, and demonstrate that his lawyer was actually aware of this potential testimony or grossly deficient in failing to find out about it. This is precisely the type of complaint that should *not* be presented on direct appeal. It must be developed in an evidentiary hearing [for post-conviction relief]." *Guinan*, 6 F.3d at 473-74.

As the observations made in Judge Easterbrook's concurrence show, the majority's reasoning in the instant cause suffers from a fundamental infirmity: it never acknowledges or explains how the defendant should have brought to this court's attention, in his direct appeal, the merits of his claim that his trial attorney was ineffective because of a failure to determine that Weliczko was a fraud and a sham who had no credentials, experience, or background in psychology, psychotherapy, or counseling. The record from defendant's

direct appeal does not reveal that Weliczko was a fraud and a sham. In fact this court on direct review specifically and explicitly referred to Weliczko as a "psychotherapist." (See *People v. Erickson* (1987), 117 Ill. 2d 271, 285.) The record of defendant's direct appeal would not have provided the necessary factual basis for the arguments presented by defendant in the present post-conviction proceeding.

The majority's ruling, and its failure to provide clear guidance with respect to its decision, necessarily places all criminal defendants of this State into a classic "catch-22," where they run the risk of being trapped in a number of "losing" scenarios. For example, if a defendant argues on direct appeal that his attorney was ineffective for failure to investigate certain witnesses, the court might reject his claim on the ground that the defendant cannot show what the investigation would have revealed, if the investigation had been performed. (See, *e.g.*, *People v. Williams* (1991), 147 Ill. 2d 173, 258; *People v. Orange* (1988), 121 Ill. 2d 364, 390.) If the defendant argues on direct appeal that his attorney was ineffective for failure to investigate certain witnesses and his appellate counsel includes pertinent affidavits in the briefs or record on appeal, the court may reject his argument on the theory that defendant is not permitted to supplement the record on appeal with evidentiary matters outside the record of the trial court proceedings. (See, *e.g.*, *People v. Jones* (1985), 109 Ill. 2d 19, 23-24 (amendments of record on direct appeal are limited to those necessary to correct record, not add new material never presented to trial court).) If the defendant files a post-conviction petition alleging ineffective assistance for failure to investigate certain witnesses, the court may deem the issue waived, as it does in the present case, reasoning that defendant should have presented his claim on direct appeal. Given the majority's ruling in the instant

cause, I question how criminal defendants in this State will now be able to preserve and present the merits of their claims based on a failure to investigate witnesses prior to trial.

The majority's waiver decision will be especially confusing for the criminal trial bar, the trial courts, and our courts of review. In light of the majority's ruling, one is left to speculate, in uncertainty, whether a claim of perjured testimony, and ineffective assistance of trial counsel, must always be presented in the defendant's direct appeal, regardless of whether the evidence supporting the argument derives from matters outside the appellate record. The majority performs a grave disservice in its lack of clear insight or guidance on these matters.

Illinois once had a well-publicized reputation for having devised post-conviction requirements that created a "procedural labyrinth *** made up entirely of blind alleys" (*Marino v. Ragen* (1947), 332 U.S. 561, 567, 92 L. Ed. 170, 175, 68 S. Ct. 240, 244 (Rutledge, J., concurring)) that effectively insulated the court from ruling on the merits of a defendant's constitutional challenges to his criminal conviction and sentence. Our Post-Conviction Hearing Act was adopted in 1949 to overcome these shortcomings. (See generally Leighton, *Post-Conviction Remedies in Illinois Criminal Procedure,* 1966 Ill. L.F. 540, 568-71.) Unfortunately, the majority's decision harkens back to this earlier era, when technical rules of procedure were manipulated in order to avoid or preclude substantive review of the criminal defendant's constitutional arguments.

II. Denial of Evidentiary Hearing

Aside from its determination that defendant has waived any challenge to Weliczko's testimony, the majority suggests that trial counsel was not ineffective in failing to locate other, qualified mental health providers to offer an expert opinion

in defendant's behalf. In this respect, the majority observes that the defendant's argument "fails substantively" and reviews the two-part test of *Strickland*. (See slip op. at 5-6.) The majority determines that the defendant was not prejudiced by trial counsel's failure to locate these additional mitigation witnesses, because the defendant would probably have been sentenced to death even if this additional evidence had been offered for consideration at the defendant's original sentencing hearing.

Specifically, the majority reasons that "[a]ny laxity of counsel notwithstanding, what is offered [in the affidavits of the mental health experts] to bolster the ineffectiveness claim does not show the result would 'reasonably likely' have been different, excluding the possibility of arbitrariness." (Slip op. at 6.) The majority's reasoning is a misstatement of the proper standard by which a defendant's post-conviction petition should be judged where the petition has been dismissed without an evidentiary hearing. The proper standard is not whether the "result would 'reasonably likely' have been different." Rather, the proper question is whether the defendant's allegations, when viewed in the light most favorable to the defendant, are sufficient to demonstrate that the defendant should receive an evidentiary hearing to prove his allegations. These legal principles are well established and longstanding. (*People v. Thompkins* (May 26, 1994), No. 72827; *People v. Ruiz* (1989), 132 Ill. 2d 1, 25-28; *People v. Caballero* (1989), 126 Ill. 2d 248, 259; *People v. Caldwell* (1973), 55 Ill. 2d 152, 155; *People v. Bernatowicz* (1952), 413 Ill. 181, 185; *People v. Vunetich* (1989), 185 Ill. App. 3d 415, 419; *People v. Witherspoon* (1987), 164 Ill. App. 3d 362, 365; *People v.*

Redmond (1986), 146 Ill. App. 3d 259, 262-63.) For example, our appellate court has stated:

> "The Post-Conviction Hearing Act provides a remedy for violation of substantial constitutional rights at trial. [Citations.] In order to require a hearing, the petitioner must substantially show that there was a violation of a constitutional right. [Citations.] Such a showing must be based on factual allegations rather than conclusory statements. [Citation.] A petitioner is not entitled to an evidentiary hearing on his petition as a matter of right. [Citations.] Rather, it is the function of the post-conviction pleadings to determine whether the petition is entitled to a hearing. [Citation.] Where the trial court determines that the allegations of the petition are sufficient to require a hearing, the petitioner must be afforded an opportunity to prove his allegations. [Citation.] On review of dismissal of a petition, an appellate court must determine whether petitioner has alleged sufficient facts to require an evidentiary hearing. [Citation.] *In making that determination this court must necessarily look to allegations contained in the petition, construed liberally in favor of petitioner and as set forth in light of the record and transcript.* [Citation.]" (Emphasis added.) *People v. Pittman* (1989), 192 Ill. App. 3d 943, 946.

The majority in the present cause does not consider whether the defendant's allegations, when liberally construed in his favor, show that the defendant is entitled to an evidentiary hearing. The majority engages in its own review of the sufficiency of the defendant's evidence, as though the majority were the trier of fact at an evidentiary hearing on the defendant's post-conviction petition. As established by the considerable precedent cited above, this is not the proper focus on appeal from the trial court's dismissal of a post-conviction petition in the absence of an evidentiary hearing.

The majority also states that the "psychologists' reports could, at best, only suggest what may have explained defendant's criminal behavior of July of 1982. The evaluations were produced years after the crimes and, apparently, without the aid of the trial record, which revealed, through witnesses' testimony, defendant's actual behavior." (Slip op. at 6.) The majority's analysis impermissibly delves into a weighing of the sufficiency of the opinions offered by the mental health experts whose affidavits were submitted in support of defendant's post-conviction petition. It is the prerogative of the trier of fact, at an evidentiary hearing, to consider the significance to be attached to the circumstance that the evaluations of the mental health experts "were produced years after the crimes." (Slip op. at 6.) Moreover, contrary to the majority's reasoning, there is nothing in the record to show whether the evaluations were prepared "without the aid of the trial record." Slip op. at 6.

The majority also offers the observation that the trial court "actually took into account the notion that defendant may have suffered from a personality disorder." (Slip op. at 6.) However, since the psychological profile offered by Weliczko was allegedly an incompetent and inaccurate portrayal of the defendant, the trial court at defendant's sentencing hearing did not take into account accurate, *bona fide* psychological evaluations such as those submitted by defendant in support of his post-conviction petition. Moreover, the mental health professionals' affidavits attached to defendant's post-conviction petition indicated that defendant suffered from neurological impairment, not a personality disorder as suggested by Weliczko. The majority also states that the "trial judge noted that a presentencing investigation report on defendant revealed a background free of what might be normally encountered given

the nature of the crimes." (Slip op. at 6.) In his post-conviction petition, the defendant has presented psychological evaluations that show the defendant did not enjoy a "background free of" disturbance or difficulty. Again, the majority wrongly engages in an unjustified and unfair weighing of the defendant's evidence without allowing the defendant the opportunity for an evidentiary hearing where the trier of fact may assess the evidence defendant presents in support of his post-conviction petition.

The record shows that there were several, highly significant differences between the opinion expressed by Weliczko at the death sentence hearing and the views stated by the mental health providers in the affidavits submitted in support of defendant's post-conviction petition. Weliczko stated that defendant had been raised in a "good *** Christian" family, where the defendant had been well taken care of and cared for by his parents. Weliczko stated that defendant became manipulative, would frequently fabricate to his parents and friends, and cared for nothing but himself. Weliczko also testified that defendant had a highly disrespectful view of women, and had relations with women that Weliczko described as "[d]irty" and short-lived. Weliczko stressed that the defendants' parents "cannot be blamed for his disorder."

The affidavits of the mental health providers described defendant as suffering from a neurological deficit prompted by several head injuries and years of polysubstance abuse. These mental health providers also stated that defendant had endured a troubled childhood in a dysfunctional family and that defendant had been the victim of sexual abuse when he was young. Given these marked contrasts in the views of Weliczko and those of the mental health providers whose affidavits support defendant's post-conviction petition, the majority's reasoning ignores the facts shown in the record presently before us.

The substantial degree to which Weliczko's testimony was damning to the defendant at his death sentence hearing, and the extent to which his evaluations of the defendant differed from those offered by the mental health professionals relied upon in defendant's post-conviction petition, deserve detailed attention by this court. Weliczko stated that according to defendant's parents, defendant had been "a quarrelsome child" and had been "basically restless as a young man," although he had had "no unusual disruptions" while he was growing up. Weliczko stated that defendant's parents said that defendant had a "chronic history" of "a lot of illnesses" that the parents suspected were "fabricated." Weliczko stated that defendant's parents represented that defendant, especially while a teenager, engaged in "a lot of lying and manipulating." Weliczko testified that the parents "felt they gave him a good nurturing—and I would say the term carefully— a Christian environment, as good Roman Catholic parents attempting to bring him to church and music lessons and things that are seemingly normal in the life of a young person growing up. They attempted to discipline him as well as provide a good home." Weliczko testified that defendant's parents stated that defendant held many jobs, but only for short periods of time. He represented that defendant left these jobs "[j]ust [from] a feeling of discontent. A kind of functional attitude that nothing is good enough."

Weliczko testified that he had interviewed defendant on several occasions after defendant was arrested. At the first interview, defendant said that he was "[a]ngry and upset" and that he felt he was not going to receive a fair trial. Weliczko stated that at a subsequent interview, he "discuss[ed] women" with defendant. Weliczko asked defendant how many women he had dated since defendant was 17 years of age. According to Weliczko, defendant responded that "he had dated at least

or related to at least 30 women and gave a cursory comment that said, 'And most of them enjoyed a good blow job.'" Weliczko observed that defendant's comment "kind of took [him] back" and that it "wasn't very enjoyable in terms of hearing." Weliczko stated that he found defendant felt a "sense of isolation and loneliness at times mixed with feelings of depression and withdrawal." Weliczko said that defendant also harbored a great deal of anger, which he directed at himself and a number of other persons. Weliczko stated that defendant did not feel remorseful for anything, and that defendant felt sorry for no one except himself. Weliczko said that he saw defendant as a person who could be violent, mostly from a sense of frustration and fear. Weliczko also testified that defendant would do things to seek approval from others. He stated that defendant's past relations with women had been short-lived, because defendant "got tired of them" and thought of them "[l]ike they were almost chattel."

Weliczko stated that defendant's personality traits revealed that he suffered from a narcissistic personality disorder. Weliczko characterized the disorder as neurotic, rather than pathological. Weliczko explained:

> "The grandiose section of self importance this idea of somehow 'I had to exaggerate my achievements and my talents,' preoccupation with fantasies, women without doubt entered into that realm that, 'Somehow I would fulfill something by engaging a woman to do what I wanted to do, but I had no ability to be intimate on a real healthy basis. I used them and I cut them off.' Dirty relationships and a blow job, as stated by him.
>
> A feeling of ideal love to a point of not Hallmark cards, but an imaginary fantasy that a woman was going to take him and go off and make it all better. Exhibitionism, the idea—*** this need for constant attention. ***

> The other element is no question of personal exploitiveness."

Weliczko stated, for example, that defendant "has admitted to the fact that he spent money many times, not his own, and cheated to do that and lied about it and did things as favors to gain favors."

On cross-examination, Weliczko stated that he did not find any evidence that the defendant had been abused as a child, and that defendant was raised in a "good, Christian home" and had been given things that a lot of children never receive.

In his written report, submitted to the court, Weliczko stated that defendant "lack[ed] empathy for the pain of others." Weliczko's report also represented that defendant "overestimated his sexual prowess and abilities as a man with unrealistic fantasies of achievement, especially with women." The report stated that defendant "described his relationships to [women] as 'dropping one and picking up another,' and [that defendant] admitted to impregnating several." Weliczko's report also represented that defendant engaged in "[i]nterpersonal exploitiveness, in which others are taken advantage of in order to indulge one's own desires or for self-aggrandizement *** and the personal integrity and rights of others are disregarded."

Weliczko's written report "[r]ecommend[ed]" that it "must be understood [that defendant] *** [i]s experiencing the diagnosed personality disorder." The report's recommendations acknowledged that defendant's "behavior exemplified" defendant's "inability to make wise choices" and that "[t]hose unwise choices must be judged by the court." Weliczko's report suggested that defendant receive psychiatric treatment "for at least one year in a hospital." The report also stated:

> "[Defendant's] parents *cannot* be blamed for his disorder. The real causes are society, peers and the judicial

system who allowed his self-deception to escalate to a point of self-destruction. ***

Suicide precautions must be administered since without psychological intervention, [defendant's] need for approval may drive him toward an aggrandized view that self-inflicted death is his only way of saying, 'he was never guilty' and deserves NO punishment for *EVEN* the faintest implication that he contributed in the group (mass) destruction of the life of [the victim]. ***

[Defendant's] participation and his accomplices, must be viewed *as a group portrayal* of a narcissistically preoccupied teenage band of reckless, unempathetic and psychologically unstable young men and women. [Defendant] cannot be the only guilty party. The blood of the victim will never be psychologically excised from the stained group who partied at the Holiday Inn, and those who assisted in the concealment of evidence." (Emphasis in original.)

In contrast to the damning evidence offered by Weliczko, the affidavits of the mental health experts submitted in conjunction with defendant's post-conviction petition provide a markedly different portrayal of the defendant. The psychological report prepared by Dr. Brad Fisher, a clinical correctional psychologist, stated that the psychologist had evaluated defendant on two occasions in 1990 and had reviewed numerous reports and administered several tests to evaluate defendant's psychological condition.

According to Dr. Fisher's report, defendant was adopted by Andzia (then age 39) and Elvin (then age 46) Erickson when defendant was only a few days old. Defendant had only one sibling, a brother much older than the defendant. Dr. Fisher's report stated that defendant's "parents reported no particular problems during this time [his early developmental years], either

academically or socially." The psychologist's report also noted, however, that "family members and Paul report that he was sexually abused by a priest when Paul served as an alter boy at the family's church." Dr. Fisher also noted that defendant had a history of head trauma and headaches. According to Dr. Fisher's evaluation, Paul also had a history of "polysubstance abuse" (alcohol and drug abuse). He also had several episodes of blurred vision, headaches, concussions, or falls.

Dr. Fisher reported that defendant's mother "presents as schizophrenic, disorganized type." Dr. Fisher reported that the mother's mental instability, defendant's adoption, and his head injuries caused defendant considerable stress, and that he "remained an immature person who has a very low self-esteem."

Dr. Fisher stated that in behavioral observations, the defendant was alert, cooperative, and able to perform most of the tasks. However, he "demonstrated several instances of marked deficits in long-term recall processing." The psychologist stated that this was not "surprising considering his extensive drug abuse and probable neurological damage." Dr. Fisher stated that the defendant was not psychotic or retarded, "but *** has significant and diffuse neurological impairments, probably chronic and longstanding."

Dr. Fisher stated that the "brain dysfunction evident from the history and the testing related to significant difficulties in cognition." Dr. Fisher stated that it was his professional opinion, to a reasonable degree of professional certainty, that defendant "was under extreme mental and emotional disturbance at the time of the offenses and that his capacity to conform his conduct to the requirements of the law was substantially impaired."

Dr. Fisher stated that he had reviewed Weliczko's report that was admitted into evidence at the sentencing hearing. In his opinion, the report "deviates significantly from what is customarily found in a competent psychological evaluation report." Dr. Fisher stated that the diagnosis given by Weliczko was "inaccurate" and that certain of the recommendations given by Weliczko "appear to represent Mr. Weliczko's personal views." Dr. Fisher stated that in his opinion, Weliczko's document "does not appear to be in accord with the usual procedures of a competent psychological assessment and is therefore likely to be inadequate, inaccurate, and unreliable." Dr. Fisher stated the following in summary:

> "This 33 year old white male is currently on Death Row Status in the Illinois State Prison System. The results of the current evaluation indicate that he is likely to be suffering at the current time from a level of neurological damage which can most easily be attributed to a combination of his substance abuse, combined with multiple head trauma. The current test and case records review findings indicate that the organic impairment has been present for a considerable period of time, and certainly would have been present at the time these crimes were committed. Since the neurological damage was exacerbated by the use of alcohol and/or drugs, Mr. Erickson's capacity to make reasonable judgments, to form coherent logic, and to properly connect ideas and make appropriate associations was likely to have been impaired. In short, his ability to make logical cognition and to make reasonable judgments were significantly impaired as a result of the substance abuse. This impairment was sufficiently severe that, in my opinion, Paul Erickson was under extreme mental and emotional disturbance at the time of the offense. Furthermore, his capacity to conform his conduct to the requirements of the law was substantially

impaired. A number of non-statutory mitigating factors relevant to Mr. Erickson's mental state were also present, including but not limited to, the above mentioned difficulties in making appropriate decisions, his immaturity and dependence upon others, and his deepseated desire for acceptance from whomever it could be obtained. Considering the long duration of his drug and alcohol abuse, it would be highly unlikely for him not to have a significant level of brain damage."

A second psychological evaluation report was provided by David Randall. This evaluation was substantially similar to the one provided by Dr. Fisher.

In light of the substantial and significant evidence cited by defendant in his post-conviction petition, I believe that defendant should receive an evidentiary hearing with respect to his allegation of ineffective assistance of counsel. Because the instant cause involves capital punishment, this court should be especially cautious to provide ample opportunity for the defendant to present evidence in his own behalf in his efforts to receive a new sentencing hearing.

The majority erroneously finds defendant has waived his challenge to Weliczko's testimony. Weliczko was the only defense expert to testify in support of defendant's defense of emotional and mental disturbance. The majority fails to acknowledge that the trial court was never advised of the true nature and extent of Weliczko's allegedly fraudulent and perjured representations that he was a qualified mental health professional. The majority also ignores defendant's allegation that Weliczko deceived the trial court from learning that Weliczko did not have the training, background, or education as a mental health provider necessary to give a psychological evaluation of the defendant. The majority fails to recognize that the opinions offered by Weliczko were highly damaging

to the defendant, and that the affidavits of the mental health providers, submitted in support of defendant's post-conviction petition, indicate that defendant suffered from significant mental disturbance.

In addition, the majority impermissibly assumes the role of finder of fact, weighs the evidence submitted by the defendant, and denies the defendant any opportunity for a hearing where he could present the mental health provider witnesses to support his allegations of ineffective assistance of counsel. According to the affidavits of the mental health professionals submitted in support of defendant's post-conviction petition, these witnesses could provide valuable insight into defendant's mental and emotional condition, thus offering significant mitigating evidence with respect to defendant's sentence. Nevertheless, the majority refuses to grant the defendant even an evidentiary hearing to attempt to prove the allegations raised in his post-conviction petition. I cannot concur in this result.

For these reasons, I respectfully dissent.

JUSTICE HARRISON joins in this dissent.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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October 3, 1994

Mr. Rawn Howard Reinhard
Skadden, Arps, Slate, Meagher & Flom
333 West Wacker Drive, Suite 2100
Chicago, IL 60606

No. 72667 - People State of Illinois, appellee, v. Paul S. Erickson, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 13, 1994.

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

THE PEOPLE OF THE)
STATE OF ILLINOIS)
) No. 82 I 200381
v.)
) Charge: Murder, etc.
PAUL ERICKSON)

REPORT OF PROCEEDINGS had in the hearing of the above-entitled cause, before the Honorable RICHARD NEVILLE, Judge of said Court, on Monday, the 11th day of March A.D. 1991.

PRESENT: HON. JACK O'MALLEY,
State's Attorney of Cook County, by
MR. MICHAEL CORKELL,
Assistant State's Attorney,
appeared for the People:

MR. RANDOLPH N. STONE,
Public Defender of Cook County, by
MS. KYLE WESENDORF and
MR. ROBERT ISAACSON,
Assistant Public Defenders,
appeared for the Defendant.

LINDA K. MADISON, CSR
OFFICIAL COURT REPORTER
2650 South California
Chicago, Illinois 60608

THE CLERK: People of the State of Illinois v. Paul Erickson.

MS. WESENDORF: Kyle Wesendorf on behalf of Paul Erickson.

MR. ISAACSON: Robert Isaacson also on behalf of Paul Erickson.

THE COURT: I have looked at all of the things that have been filed. Everybody ready for argument?

MS. WESENDORF: Yes, Judge.

MR. CORKELL: Since it is our burden at this point, I think a lot of these things I am going to cover and save for rebuttal. The question is whether or not counsel—

MS. WESENDORF: I am sorry. I thought we were all taking our seats.

THE COURT: I was going to have everybody sit.

MR. CORKELL: This will be very, very brief, Judge.

THE COURT: That is all right. Have a seat.

Go ahead, Mr. Corkell.

MS. WESENDORF: Judge, if I may, it is our position that since it is our petition that we would be requesting the opportunity to address you first.

MR. CORKELL: Well, Judge, on a Motion to Dismiss it is the State's burden.

THE COURT: Right. Go ahead, Mr. Corkell.

MR. CORKELL: Basically the issues addressed in the petition, Judge, I am just not going to go over each and every one of the constitutional claims alleged. The question before

the court is whether or not, as I see the case, whether or not Mr. Seiden was effective or ineffective and in terms of those situations whether or not in fact there is a reasonable probability that the new evidence adduced in light of the entire record would support a claim of an unfair sentencing hearing, to wit, that the mitigation evidence supplied by the Petitioner at this stage from I believe Dr. Fisher would be sufficient in fact to not only support a claim of ineffective assistance of counsel but also would show that there is a reasonable probability that the sentencing authority in this case would have entered a sentence other than death.

It is the State's position, Judge, that the argument concerning the extreme emotional distress factor is one of many factors in a capital sentencing hearing that has to be weighed in light of not only the evidence but in light of all of the aggravating factors.

I submit, Judge, that, number one, the testimony of the witness Weliczko in fact was not prejudicial. I don't think it hurt them at all because there is no definition of what extreme emotional disturbance or distress is in the cases we have cited.

Also, I think, if you weigh and you have to weigh the factors in aggravation and mitigation in this case, there is not a reasonable probability that in fact the sentencing authority in this case, who is Judge Toomin, would have sentenced the defendant to anything other than death.

As we have cited, not only the extreme aggravating factors and circumstances adduced at the trial but the other evidence that came in the aggravation stage. For those reasons, Judge, we don't think they have enough to have a hearing.

THE COURT: Go ahead, Counsel.

MS. WESENDORF: Judge, Paul Erickson was sentenced to death after a sentencing hearing at which there was no

mitigation presented on his behalf. If there is one fundamental rule about death penalty sentencing hearings, it is that the sentencer has to hear both sides, has to hear the aggravation, has to hear mitigation and has to weigh it. And this is particularly critical in Illinois because in Illinois under our death penalty statute if there is no mitigation then death has to be imposed; it is a foregone conclusion.

Through a series of circumstances involving the fraud perpetrated by John Weliczko and the ineffective assistance of trial counsel the sentencing hearing in this case was nothing but a lopsided affair at which Paul Erickson didn't stand a chance because there was no mitigation presented.

Weliczko was not only exposed as a fraud; and we have shown with the exhibits attached to the postconviction petition that he in fact was a bigger fraud than was even brought out at the sentencing hearing, not only—

THE COURT: How is that relevant if the sentencing judge didn't know of his fraudulent background?

MS. WESENDORF: It is relevant, Judge, because the lies that John Weliczko told the trial court about his academic background and his other credentials caused the judge to let in his testimony and consider his report even though he wasn't qualified as an expert.

We know that through the exhibits attached to our petition that there was in fact substantial and easily available mitigation there waiting for defense counsel and so not only did defense counsel put Weliczko on to testify not about mitigation but about aggravation but defense counsel failed to put on—to investigate and put on the other available mitigation.

I would like to briefly go through the State's response to the claims, and I would like to point out, reiterate, that the

ineffective assistance of counsel is not the only issue in this case.

The first claim in our petition concerns the fraud perpetrated by John Weliczko. Now, the State has argued in their response, and they argue again today, that no harm, no foul, on John Weliczko because he testified in mitigation. Well, your Honor, he didn't testify to mitigation and his report is not mitigation; it is aggravation.

Now, I would like to give you an example that I think illustrates that. If defense counsel is in a death penalty hearing and he calls a correctional officer to the stand to testify for the defendant about the defendant's prison background and the correctional officer takes the stand and says the guy is always in trouble, he's got 37 tickets, he's beaten up a couple of guards and we can't control him, we don't know what to do with him, the fact that that evidence was offered by defense counsel during the Defense's case in mitigation doesn't mean it is mitigation.

We are not bound by that. You have to look at the substance of the testimony and the effect it had on what went on during the sentencing hearing. And if you look at what Weliczko testified to, the kinds of things he said about Paul Erickson and what he says about Paul Erickson in his report, his so-called report, that evidence and that testimony is not mitigation, it is nothing but aggravation.

The State claims that this—and I think this can be dispensed very quickly, it goes to the question that you just asked me, Judge—that what if Weliczko did in fact perjure himself. I think it is clear with the exhibits that he did. He misrepresented himself that he had psychological training and he misrepresented the nature of his degrees.

The State says also the fact that Weliczko's report is inaccurate and incompetent is not cognizable in a postconviction petition because it is not a constitutional error. I submit to you, Judge, that courts at every level have recognized that it is an Eighth Amendment violation to give someone the death penalty based on false or misleading information.

I draw your Honor's attention to the U.S. Supreme Court case of *Johnson v. Mississippi* where they vacated a death penalty because it was based in part on a New York misdemeanor conviction which in turn turned out not to be valid.

The *Kubat* [phonetic sp.] case from the Seventh Circuit, Mr. Kubat's death penalty, was vacated because the sentencer thought he had two misdemeanor convictions from New York when in fact he didn't.

And there is also the *Deben* [phonetic sp.] case from the Illinois Supreme Court indicating that—in which the Supreme Court indicated that it couldn't uphold the death penalty in that case because there was false information about Mr. Deben's psychological background and his service in Vietnam introduced at the sentencing hearing and considered by the sentencer.

So it is clear that what went on in this case, that the inaccurate and the misleading information given through Weliczko's testimony and his report is constitutional error.

The State also claims that the weight to be accorded the expert's testimony is also not cognizable. Well, they are sort of jumping the gun a little bit. At this point the only issue before you is if everything we have stated in our petition, alleged in our petition, is in fact true whether or not we are entitled to an evidentiary hearing at which we would be given the opportunity to prove up the factual allegations.

So I think at this point it is not a matter of you being asked to reweigh the evidence in the case. We are not asking you

to reweigh it. We are simply requesting that we be given the opportunity that this petition entitles us.

With regard to our second claim which is—concerns the denial of the request for a continuance, the State claims that this is res judicata because it was raised on direct appeal. The State is only partly right about that and in fact it is not res judicata because what was raised on direct appeal was the denial of the continuance and the fact that we should have had an expert at which Weliczko was exposed as a fraud.

THE COURT: What did happen on the direct appeal?

MS. WESENDORF: On the direct appeal the Illinois Supreme Court agreed with what the-with the trial judge's reason for denying the continuance, and that was because any additional evidence that defense counsel could get at that point would have been cumulative to what Weliczko testified and put in his report.

Now, of course, we know now based on the exhibits, our exhibits Nos. 1 and 2, that the real mitigation in this case would not have been cumulative to what Weliczko had to say because what Weliczko had to say was in fact aggravation and it was inaccurate because he wasn't qualified and his conclusions were not based on any facts about Paul Erickson and his history and his background. So that claim is not res judicata because we have adduced new evidence in the postconviction petition that shows that it would not have been cumulative.

With regard to the State's response to claim number three which concerns again the fact that the death sentence in this case was based on inaccurate and misleading information and was, therefore, not a fair or reliable death penalty, the State concedes in their response that this is a question of fact. That is precisely why we are entitled to an evidentiary hearing so that these questions of fact can be decided.

Very briefly, the State's response to claim number six which concerns—which is the prosecutorial misconduct claim, the only thing I would like to point out about that is that the State has really misconstrued the nature of our claim. We are not contending that the State has a duty to disclose all mitigating information in that claim, that is not the nature of that claim. We are simply claiming that the denial of the continuance coupled with the ambush that occurred on Weliczko's voir dire is the prosecutorial misconduct.

I would like to turn now to the—

THE COURT: I don't understand that. What do you mean the "ambush," Counsel?

MS. WESENDORF: I am sorry. I could have made that a lot clearer.

In that claim what we are claiming is that what occurred during voir dire—let me back up a minute. What occurred during voir dire on Weliczko's qualifications as an expert was that the prosecution, and this will become relevant also in a couple of minutes when I start talking about the ineffective assistance of counsel claims, but there was a continuance between trial and the sentencing hearing. My recollection is that it was about four weeks. And during that period of time the State discovered, was able to discover that Weliczko was in fact a fraud and they came to the sentencing hearing prepared to expose that fact.

They had with them documents from Illinois Department of Registration, which is the licensing state agency, showing that Weliczko was not registered as psychologist or a psychiatrist and they also had some of his academic—some documents about his academic credentials. They didn't have all of them, of course, because we know now he was not in fact—didn't hold

the degrees that he said he did even at the end of the voir dire on his expertise.

So the Prosecution came prepared to expose him and, of course, defense counsel through his own failures was unaware of that and what essentially occurred on the voir dire was that the Prosecution was loaded and ready to go and defense counsel was caught completely unaware.

Following that though defense counsel then moved for a continuance to secure an expert's testimony and the Prosecution objected and it was the basis of that objection which enabled Judge Tommin to deny the continuance. So that is the nature of that claim.

I would like to—Inasmuch as the State has addressed all the ineffective assistance of counsel claims together, I would like to do so too but I think a couple of them deserve some additional comments.

We have raised five claims regarding the ineffective assistance of Paul Erickson's trial attorney at sentencing. These claims relate generally to counsel's failure to investigate and present the substantial mitigation that we have set out in the exhibits and as you have seen, Judge, there was a great deal of information that was readily available that was favorable to Paul Erickson that trial counsel did not bother to look into or to present at sentencing.

Of course, what he did present was a witness whose credential he never checked out and I think that it is—again I would like to reiterate that the Prosecution had the time, there was that continuance, the State had the time between the trial and the sentencing to look into Weliczko's background, and they did. Trial counsel got a continuance to prepare for the sentencing hearing. He only had one witness, and yet he didn't bother to check into that witness' background.

So this is not a situation where a trial attorney, a defense attorney, for scheduling purposes finds himself immediately into the death penalty phase right after trial; he's got a lot of witnesses, a lot of things to do and maybe overlooks or for whatever reason, we don't know, doesn't check into an expert's background. This is a lawyer that had four weeks and he's got one witness and he didn't bother to pick up the phone and find out if this guy was really a psychologist or a psychiatrist.

THE COURT: Well, I thought he was recommended to this guy by the defendant and the defendant's parents.

MS. WESENDORF: He was. Weliczko—

THE COURT: Well, you would think that he would be able to rely on people who are friends of the defendant, including the defendant himself, to—I mean I don't find that lawyers need to treat their own clients and their clients' families as adversaries. So I am not so sure that that argument, at least as to that point, makes much sense to me.

I practiced law for a long time. Everybody has a lot of things to do. Be that as it may, go ahead.

MS. WESENDORF: It is our position that he should have at least, I am not suggesting that he conduct an investigation of the man, simply that he verify his credentials.

But nonetheless, there is a second part to this claim, and that is that trial counsel should have realized, any competent lawyer would realize after talking to Weliczko and learning what he was going to testify to and what was in that report that that report was not mitigation; it is not favorable to Paul Erickson. It is aggravation.

I talked about this in the beginning when I gave the example of the correctional officer. We are not bound by the fact that this evidence was given by a defense witness during the mitigation part of the sentencing hearing. We have to look

at the substance of it and what happened in this case was—in a way this is worse than the case where there is no mitigation presented because you've got the aggravation presented by the Prosecution and then you've got the aggravation presented by the Defense.

There was no evidence favorable, there was no evidence on Mr. Erickson's side presented at the sentencing hearing which, of course, under Illinois law made death a foregone conclusion. There was no way the sentencer could have come to any other decision in this case.

The State responds generally on the ineffective assistance of counsel claims and also on the other claims as well that Paul Erickson wasn't prejudiced by this series of circumstances, the fraud by Weliczko and the ineffective assistance of his lawyer.

The State says you, Judge, have to decide whether there is any possibility, any probability, that the result would have been different. I would just like to note that, of course, it is not Judge Toomin's mind that we have to get into here. The standard is whether or not a sentencer would have come to a different decision. When your Honor is ruling on motions for new trials and when reviewing courts go back and try to decide whether or not some error was prejudicial, we don't call back juries and ask them about it or ask trial judges what they would have thought after the fact.

THE COURT: Does that mean that I am supposed to take into consideration the facts of the crime and impact that would have had on the judge as well as what mitigation you have added to the petition?

MS. WESENDORF: Yes, because the facts at the trial are always part of the aggravation, circumstances of the offense are part of the aggravation at the sentencing hearing; but there

was no mitigation presented at this sentencing hearing and we now have a tremendous amount of substantial mitigation. The question is—

THE COURT: Hold on. Am I supposed to evaluate the mitigation that you submitted?

MS. WESENDORF: Your job today is not to reweigh. At this sentencing hearing there was all this aggravation; there was nothing on the other side to weigh against it for all the reasons I have been talking about for the last couple of minutes. The determination today is can it be said on this record that there is no probability that the result would have been different in this case now that we've got something on the other side of the scale to balance against all the aggravation.

There was nothing on that side of the scale the first time. There is now a lot on that side of the scale and it can't be said on this kind of a record that there was no prejudice suffered because, like I said before, and I think it bears repeating, this is almost worse than a case where there is no mitigation presented because we've got the defense lawyer putting on aggravation and aggravating testimony.

Paul Erickson never stood a chance in this sentencing hearing. His only witness gets on the stand and submits a report that is nothing but aggravation, testifies to nothing but aggravation. His defense lawyer doesn't even bother to investigate and then put on the readily available mitigation that was waiting out there for him and as a result this sentencing hearing was unfair. I mean it violates our basic notions of what is fair.

We heard nothing in favor of Paul Erickson. Everything was on the other side of the scale. Not because it wasn't there, but because his lawyer didn't try to find it and because his lawyer put on an incompetent fraud.

On this record it cannot be said that what occurred at Paul Erickson's sentencing hearing made no difference. Under Illinois law, if there is no mitigation, death is a foregone conclusion. He didn't stand a chance at this death penalty hearing and what we are asking for today, your Honor, is the opportunity to prove up—We can prove up the facts in our petition and we are asking for the opportunity to prove them up at an evidentiary hearing.

THE COURT: Well, what does that mean? Does that mean you want the chance to bring in these people to say what they said in the affidavits?

MS. WESENDORF: Yes, Judge.

THE COURT: At what stage? Would I be rehearing sentencing at that point or would someone else? I mean, I am not sure what you are saying. I don't doubt that what you have in here you can prove. Is that what you are asking me?

MS. WESENDORF: We are asking that we be given the opportunity to prove the facts alleged in our petition.

THE COURT: To what end?

MS. WESENDORF: At which point your Honor would then determine given the fact that we have been able to prove up the facts in our petition, whether it entitles us to a new sentencing hearing.

I would simply add in the alternative that if your Honor today believes the facts as we have alleged them in our petition, that these facts entitle us to a new sentencing hearing if so I would certainly request in the alternative that we be given either an evidentiary hearing or, if your Honor believes the facts in our petition, that we be granted a new sentencing hearing today.

THE COURT: Okay.

MS. WESENDORF: Thank you, Judge.

THE COURT: And I will let you respond if Mr. Corkell brings up something you haven't had a chance to address.

MR. CORKELL: It is the State's position at this point, I think your Honor is correct; if you take a look at the record, one of the points that it is very clear, in fact Judge Toomin stated in the record I have weighed all of the aggravating factors and mitigating factors. In fact, he took Weliczko's testimony as true. I think another thing is that it wasn't necessarily a lopsided affair. I think as your Honor pointed out, and as we have pointed out, the veritable, quote, arsenal of the State's aggravation in this case was overwhelming. The issue before your Honor today and the issue in our Motion to Dismiss is that we do not feel there is a sufficient basis, number one, to order an evidentiary hearing on the basis of the record, on the basis of the crime for which the defendant stands convicted and a rather lengthy aggravation/mitigation hearing.

It is the Respondent's position, Judge, that the testimony of Weliczko, because there is no definition of what extreme emotional disturbance is under the statute, there is no case saying what it is, it can be anything. I submit in light of the record, Judge, that he did receive a fair sentencing hearing.

The fact that Weliczko had some problems later on down the road has nothing to do with it. I don't think that their affidavits and their new report of a psychologist is such that it would outweigh the factors at that sentencing hearing.

And very briefly, Judge, we would ask that you dismiss their petition on its face or in the alternative you would have to order an evidentiary hearing.

THE COURT: Or, in the alternative, what?

MR. CORKELL: Or, in the alternative, you would have to go to the next stage, you would have to have an evidentiary hearing, hear the actual witness.

THE COURT: Ms. Wesendorf.

MS. WESENDORF: I am going to be brief, Judge. At Paul Erickson's sentencing hearing, Weliczko testified and his report says, and I am going to characterize it, but his report said that Paul was a pet god. He said he had an antisocial personality disorder with narcissistic features and he and the State's rebuttal witness agreed. So the defense witness is testifying to the same—

THE COURT: Well, isn't it possible that they are both correct?

MS. WESENDORF: No, it is not.

THE COURT: What do you base that on?

MS. WESENDORF: My Exhibit No. 1, the report by Brad Fisher. Dr. Fisher's testing was much more extensive than Dr. Bogen's and this more extensive testing and more extensive review of the Petitioner's background renders his opinion much more credible and due more weight than Dr. Bogen's.

The State says that, you know, given the facts of this case that there is no way that anyone could come up with any mitigation that would outweigh it. Judge, I respectfully submit that there are many cases everyday in this building with very aggravating facts in which people do not receive the death penalty by either the judge or the jury because of the nature of the information that is presented on their behalf.

And if I could just for a minute return where I began which is what the sentencer heard in this case, it was that Paul Erickson was a bad guy and that it was through no fault of his parents that, you know, he just turned out to be this really bad guy and that he came from a terrific home and everything was fine.

That is in fact not the case. That is not an accurate picture of this defendant. Paul Erickson in fact suffers from a history of drug and alcohol abuse from his early teens. He suffers from a history—from neurological impairment which affected not only his—not only exacerbated the effects of the drug and alcohol problem but also had significance on his mental state at the time of the offense.

Again, Dr. Fisher's report is based on a far more complete review of Mr. Erickson's background. The substantial head injuries that Mr. Erickson has suffered and the other physical problems that are set out in Dr. Fisher's report, none of this came before the sentencer at the sentencing hearing.

The picture of Paul Erickson and his background that emerged at the sentencing hearing is not the true picture. He doesn't come from a normal middle class family. He comes from a family which is severely dysfunctional. His mother has tremendous psychological problems herself which are set out not only in Dr. Fisher's report but also detailed in David Randall's report and has been corroborated through the observations of people who knew the family when Paul Erickson was growing up.

Paul Erickson grew up in a family where he was emotionally deprived and psychologically abused. This is not the picture that emerged at the sentencing hearing in this case, and it cannot be said that this evidence would have made no difference.

As I mentioned before, there are numerous cases with very aggravating facts in which death sentences are not imposed and that occurs in the case because of the information about the defendant that comes before the sentencer. None of this information was presented during Paul Erickson's sentencing hearing.

Dr. Weliczko couldn't find anything good to say about Paul Erickson, but there were plenty of people out there who did have good things to say about Paul and that Paul is not the totally bad guy that Weliczko and the State's witnesses painted him. And that information is contained in the report that was prepared by David Randall as well as Dr. Fisher's report.

If I may have just another minute, Judge, I wanted to—

THE COURT: Go right ahead.

MS. WESENDORF: With regard to the witnesses, again this mitigation was out there readily available. There was Mr. Hart whose affidavit is in our petition. And Mr. Hart knew Paul Erickson as a boy, and he had good things to say about Paul Erickson. He would have been able to testify that Paul was a good kid and got along well in school and tried hard in class.

Ron Yurcus whose affidavit is in our petition would have also testified to a side of Mr. Erickson that never came in at the sentencing hearing.

The information in David Randall's report about Paul Erickson's family is corroborated by not only neighbors who live next door to the Erickson family but by Paul's stepbrother and sister-in-law. Paul was adopted long after his older brother was out of elementary school and was a teenager. So there is a very large gap between Paul and his brother and why this is important is because it allowed us to find out from Paul's brother who was around during the sentencing hearing in this case, it allowed us to find out from Paul's brother, from someone other than Paul's mother whose view of the world is tainted by her own psychological problems, but to find out from Paul's brother what it was like for Paul when he was

growing up and why he turned out to be the person that he is today, which is, Judge, after all what mitigation is.

Mitigation is a reason not to impose death. It is not an excuse for the crime, but it is the information about the defendant that allows the sentencer to get a true picture of the person and to understand why the defendant is a person who should not be sentenced to death, not not punished but not be sentenced to death.

So through Paul's brother and I think fortunately for us Paul's brother's fiance, now his wife, who is a psychiatric social worker, Carol Erickson, she has training in dealing with dysfunctional families and with psychological problems and she is able to tell us, she was looking in on this family—

THE COURT: Is this part of your petition or is this outside?

MS. WESENDORF: No, this is in the petition, your Honor.

THE COURT: I didn't mean the petition. I meant part of your exhibits.

MS. WESENDORF: Yes, it is in Exhibit No. 2.

THE COURT: Go ahead.

MS. WESENDORF: And Carol Erickson was able to tell us that the family that Paul Erickson grew up in was not a normal functioning middle class family, and she talks about the fact that she told the family way back when Paul was young to get him some help and nobody ever got him any help.

All we have is Paul not getting help and continuing to try to survive in this dysfunctional family with a mother with her own psychological problems and then the head injuries start and then the drug and the alcohol abuse starts.

So this is an entirely different picture. The true picture about Paul Erickson that didn't come out at the sentencing

hearing is a hundred and eighty degrees different from what the sentencer in this case thought it was.

THE COURT: Well, is it your position that he was a normal, well-adjusted child in high school, which is what the two affidavits you have in here from people who knew him in school and the teachers said, or is it that he is in a dysfunctional family and, therefore, he was in some way not a normal healthy child?

MS. WESENDORF: Those two things, Judge, are not inconsistent because the purpose of the testimony of Mr. Hart and Mr. Yurcus would have been to show the sentencer that, despite having had to deal with this, try to grow up in this horribly dysfunctional family with this dominating, overbearing mother with her own psychological problems and the older absent father, that despite having to survive in that family there was a good side to Paul Erickson that Mr. Hart and Mr. Yurcus saw.

Those two things are not inconsistent. They could have been presented to the sentencer in a consistent manner. They are not inconsistent at all.

There was a good side to Paul Erickson and he deserved to have the sentencer who is deciding whether or not he is going to live or die, he deserved to have the sentencer know everything about him and have a true picture of who he was and it can't be said that just because the facts in this case are aggravating, which they are, it can't be said that it wouldn't have made any difference.

There are very aggravating cases every day in which the death penalty is not imposed and it is not imposed because the sentencer has been given reasons not to impose death, and we call that mitigation, and Paul Erickson had a right to present it and he was robbed of that right.

THE COURT: All right. Thank you, Counsel. Do you have anything else?

MR. CORKELL: No.

THE COURT: I just have three questions for the lawyers. Do I stand at this point in the shoes of Judge Toomin since he opted to send this out of his courtroom and I got the case, or do I stand in a position different than Toomin would if he had kept it? Who can give me an answer to that?

MR. CORKELL: Well, Judge, it is our position you would stand in the position of a sentencing authority. You have to view the evidence as to whether or not it would make a difference.

THE COURT: What is your position on that?

MR. ISAACSON: If I may respond, obviously your Honor doesn't have the opportunity to look back on testimony that came before you because of the peculiar circumstances of the case. Judge Toomin rescued himself, so I guess my answer would be you have to do the best you can with all the evidence presented to try and objectively decide if there is just a possibility that this evidence would have made a difference based on all of our claims bearing in mind, as Counsel just stated, that there was no mitigation, everything was on the side of the State that was presented at the sentencing hearing.

THE COURT: Okay.

Well, then the other two questions I don't have to ask because if I stand in Judge Toomin's position then I know what I have to do at this point.

Let me first say that this case has been going on in my courtroom for about a year and a half and it was in Judge Toomin's courtroom for eight or nine months before that on a P.C. which is to the lawyers' credit that represented Mr. Erickson for all that time and the effort that they put forward.

I would say after that length of time and with all the effort that has been put in there has been brought forward what they believe and what they have presented in this petition as mitigating factors that would have influenced Judge Toomin in this case.

I might say that I have read all of the exhibits which have been filed and I have read as best I can the transcript of the prior proceedings as well as all of the parts of the prior transcripts that either side thought were important for me to know about in their own issues.

I might say at the outset as far as the psychological, if that is the appropriate term for all of this testimony which was presented at the original sentencing hearing and which has now been included in the P.C. which is filed in Mr. Erickson's behalf, as usual with these type of abstract concepts and subjective interpretations by different doctors it is very difficult to find a common thread that goes through all of the reports where one can say with certainty that a specific type of person or a specific result from treatment would be found.

It is my experience in dealing with these type of reports that doctors indicate that substance abuse has an impact on the person but they have and usually admit when examined that they can't tell whether substance abuse in some way affects the psychological makeup of the person and that is what occurred first or whether or not people have psychological problems and that is why they use substances to abuse their bodies, and the reason that doctors can't tell is because there is no way to make a clear delineation by examining someone after the fact to make that determination.

In this report which is filed on behalf of Paul Erickson, Dr. David Randall indicates that he believes that Mr. Erickson's conduct is explained by substance abuse and head injuries.

I don't think anyone contested that at the original hearing, that Mr. Erickson was a substance abuser. In fact, it appears on the night of the incident that there was plenty of testimony as to all of the ingestion of materials not only by Mr. Erickson but all the other people at the gathering. Partially he was responsible for that because he obtained the substances and partially other people were.

So the fact that there was substance abuse is not in contest as far as I am concerned. I am sure Judge Toomin was aware of it from listening to the testimony and also from the reports of the doctors who testified before.

It is troubling about this Dr. Weliczko, whatever he is, and the fact that his background was not a background as it was represented. Interestingly enough, however, he did graduate from Harvard University and he did have significant post-degree education and experience.

It appears that because of the way that Departments of Registration and Education require people to have their degrees in order before they license them as psychologists that he made representations about what his courses were in order to fit into that type of program which in fact that was not correct.

That information was in front of Judge Toomin, but Judge Toomin allowed him to testify anyway and no one has addressed the issue why Toomin would allow someone to testify if Toomin believed he was a fraud and had no background, why he should be allowed to testify as to anything.

He is in fact someone who knew the family and is in fact someone who knew the defendant and is in fact someone who dealt with the family in the nature of a sociologist. I will say that instead of a psychologist because apparently he didn't have any psychology courses; but Weliczko, I disagree with Ms. Wesendorf and the P.C. that's been filed.

I do not believe that Weliczko testified in aggravation for Mr. Erickson. You choose now to characterize his testimony as aggravation because that explains to your satisfaction why Judge Toomin entered the order that he did, but in fact he was presented in mitigation, did testify to mitigating factors and it is for the sentencing judge to determine whether or not those mitigating factors are sufficient to overcome the aggravating factors in the case, and I believe that is what Judge Toomin did.

It is not as relevant to me that Mr. Erickson did not have Dr. Randall testify as to what either or each of them said. Both of them testified to basically abuse and Randall testifies to some head injuries that without being able to say what it is that they did, he says it is likely that the combination of those two would have affected him in some way; but it does not indicate as to how it would have affected him and it is difficult in trying to determine what sentence to impose to say that I should guess as to how this affected Mr. Erickson.

It is clear from the facts at the trial that Mr. Erickson embarked that fateful evening on a fourteen- or fifteen-hour course of conduct intending the entire period to rape and murder this girl, and it does not appear to me that in the testimony of his activities it shows that in some way he at any time second-guessed what he was going to do. In fact, he took two younger men and involved them in his plot and involved them in both the rape and the murder in varying degrees, and all three were involved in the hiding of the body and then dumping it in a lagoon to prevent the body from being found.

So it appears that if the Defense position is that he was unable to know what he was doing, I don't accept that and Judge Toomin didn't. If the Defense position is that the substance abuse that he engaged in voluntarily would have in

some way mitigated this conduct because it is explained by a troubled childhood, I find that is inconsistent with the testimony by affidavit which I accept by people who knew him in high school who said he was a normal kid, didn't cause any trouble and was a regular kid.

It appears that Mr. Erickson has inconsistent behavior which is not unusual for people who use substances and abuse them, and it is certainly without question the fact that Mr. Erickson conducted himself in conduct which was inappropriate.

I disagree with the Defense position that there are lots of cases where there is more severe aggravation or cases where the conduct of the defendant is more outrageous than this. I disagree with that entirely. I have found no cases that I know of where planned rape/murder of a child is more egregious than this case. I have handled plenty of cases myself over the twenty years I have been in this business. I am aware of all the matters that have occurred in this building over the last eight years on a firsthand basis, and I think that that statement is totally inaccurate.

This is a case of first-magnitude outrageous conduct. Conduct which it might be said that the planning of this being over a long period of time completely and totally convinces me that Mr. Erickson's conduct was not one which was influenced or in some way induced by a drug or alcohol-related state. It does appear, during the course of the entire evening, alcohol and substances were used by the participants, but the plan was made before all of that occurred.

So I might say that I have reviewed this entire record. I do commend the Public Defender's Office, the participants that are here today, for all the work that was involved and I might state that over two years of work was put into this petition to find those elements which are now contained in it.

But I do not believe that even with that extensive time and all the things that were included that Judge Toomin would have found that there was a mitigating factor, accepting all the things that are in this petition, which would have been sufficient to overcome the statutory requirement for a crime like this and, therefore, I find that no hearing is necessary because I accept the factors which are in the P.C., I believe that the Public Defender's Office in the person of Mr. Isaacson and Ms. Wesendorf would not have submitted affidavits for which they couldn't produce the witness to appear in court.

I have read those. I have evaluated them. I have used those in connection with what Judge Toomin would have done at a hearing in aggravation and mitigation and I find that the petition is without merit, and it will be dismissed.

MS. CORKELL: Thank you, Judge.

(Which were all the proceedings had in the hearing of the above-entitled cause.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE)
STATE OF ILLINOIS)
)
) Indictment No. 82 I 200381
vs)
) Before: JUDGE RICHARD
) NEVILLE
PAUL ERICKSON) Tuesday, August 20, 1991.

Court having reconvened pursuant to adjournment.

APPEARANCES:

HON. JACK O'MALLEY,
State's Attorney of Cook County, by
MR. MICHAEL CORKEL,
Assistant State's Attorney,
appeared on behalf of the People;

MS. RITA FRY,
Public Defender of Cook County, by
MR. KYLE WESENDORF,
Assistant Public Defender,
appeared on behalf of the Defendant;

Annette W. Washington
Official Court Reporter
2650 South California
Chicago, Illinois 60608

THE CLERK: Paul Erickson.

MR. CORKEL: Motion for reconsideration. It's my understanding Bob Isaacson came down, left a copy with you.

THE COURT: If he did, he didn't leave it with me personally.

MR. CORKEL: He did not leave it with you personally, obviously.

THE COURT: You want to file a written response?

MR. CORKEL: I think your ruling is sufficient, Judge.

THE COURT: I have got a jury I'm supposed to start this morning. Let me see what I'm doing with that. Do you have any place else you have to go?

MR. CORKEL: No, Judge.

MR. WESENDORF: No.

THE COURT: Give me a couple of minutes. I'll take a look at this do it this morning.

(The above-entitled cause was passed, after which the following proceedings were had)

THE CLERK: People versus Paul Erickson.

THE COURT: All right. I have read the petition on Erickson. I'm ready to listen to whatever argument. I think it's your argument.

MR. WESENDORF: Judge, the motion to reconsider I think, is self explanatory. When your Honor denied Mr. Erickson's petition for post conviction relief without an evidentiary hearing, one of the points that your Honor made was that

in response to my argument, that -- let me back up for a second. I have made this much too confusing.

One of the points of my argument, with regard to the prejudice prong, was that I asked your Honor to take notice of the fact that there were other cases in this building that were as serious as Mr. Erickson's case in which the state sought the death penalty. But the death penalty was not imposed. And the reason was because there was mitigation presented on the defendant's behalf. I think that that argument was misunderstood.

When your Honor denied the petition without the evidentiary hearing, you said my reading of the finding was that you said that I was somehow trying to deprecate the seriousness of Mr. Erickson's offenses. And that that was the reason why I felt that he had been prejudiced because I did not view his case as a serious case. I filed the motion to reconsider to clarify my point.

THE COURT: Okay.

MR. WESENDORF: That my argument on the prejudice prong does not hinge on Mr. Erickson's case being any less serious than we all know it to be. And that my point was that's what makes the difference even in the most aggravated of cases. What makes the difference is whether or not there is mitigation presented on the defendant's behalf because under our statute, that's what allows the sentencer to impose a sentence other than death. When there is no mitigation in the -- in a case in Illinois, death is a foregone conclusion. And there was the point of that particular argument that I was making with regard to the prejudice prong.

THE COURT: Okay. I understood that. I don't know that death is a foregone conclusion. I don't even remember

as we sit here now, whether there was a jury, a judge that decided—

MR. WESENDORF: Bench proceeding.

THE COURT: Bench proceeding. Judge Toomin, right?

MR. WESENDORF: Yes.

THE COURT: Who I think is a very fine judge. And who certainly had his share of cases like this. I guess what you're asking me to do is speculate about what ought to have happened. And if it happened, what the evidence might be that someone would put on on behalf of Mr. Erickson. And I don't know if you are allowed to do that in a PC, are you? Are you allowed to bring in—

MR. WESENDORF: May I respond?

THE COURT: Sure.

MR. WESENDORF: I do not intend to and am not asking you to speculate. My argument is a purely a legal one. And it is that without any mitigation presented on a defendants behalf, there is—the statute certainly suggests and the Illinois Supreme Court case law certainly suggests that without anything to balance against the aggravation, death is going to be the result. You need not speculate what any sentencer would do, whether it was Judge Toomin or a jury, whatever. You don't have to speculate in Mr. Erickson's case because there wasn't any mitigation presented. So, there was nothing to tip the balance of the scale. So, I'm not asking you to speculate. It's a legal point that I make.

THE COURT: Okay. Mr. Corkel?

MR. CORKEL: Judge, I believe your Honor gave us a 20 minute ruling the last time the case was up. I don't see where there's anything additional to be added. I think that your Honor reached the correct decision. Was not a reasonable probability that in fact a different result would be reached.

Your Honor also denied the points in the petition with respect to ineffective assistance of counsel. And we'd ask that you deny the motion to reconsider.

THE COURT: Well, I think it's appropriate for Mr. Wesendorf to make it clear in the record what the argument was. If I misunderstood it, although I thought I understood it. Maybe I wasn't very articulate when I ruled. But I do understand what you're saying. And I guess what I'm saying. And I guess what I'm saying is that some place along the line that there has to be an end to litigation. And if it were a situation where the judge hadn't spent some considerable time listening to evidence and making a decision on—what is always a difficult case to begin with, then perhaps I could agree with you. But I don't think that the reality of these types of cases is that the amount of time that's spent reconsidering what ought to have happened during the original trial is productive because what we're doing is second guessing all those things that trial lawyers do during the course of trial, both state and the defense, in an attempt to change the outcome. Because in reality, that's really what we're doing here. We're trying to have arguments to decide whether or not there should be a different outcome.

Since I found that there was no ineffective assistance of counsel, based on the record that was presented to me, I don't see that the reconsideration is appropriate on the point of mitigation. Everybody presented what evidence was appropriate at the time. And Toomin had a difficult decision to make and made it. And I didn't find anything in the record—I mean the best argument you had was the issue of whether or not putting on the guy they put on was a plus or minus. And I'll say that in all the death penalty cases I've heard, much of the evidence cuts both ways. Much of the information that sitting judges get to decide life or death, if a jury is not doing it, is

a matter of some subtle and often interesting interpretations. There are those people who believe that because someone has had a bad childhood, they shouldn't be punished as severely for things they do when they become adults. And there are other people who believe that if you're antisocial because of a bad childhood, you shouldn't be allowed back into society because you are going to do it again. So, that's just one issue that cuts both ways. And that's why I don't think that this is the appropriate—or I'm the appropriate one to reconsider what Judge Toomin did based on what I saw in that record. So, motion to reconsider is denied.

MR. CORKEL: Thank you, Judge.

MR. WESENDORF: Judge, I have one other matter, if I might.

THE COURT: Okay

MR. WESENDORF: Very quickly.

THE COURT: Yeah.

MR. WESENDORF: I will be appealing your Honor - your Honor's decision. And we—

THE COURT: Okay

MR. WESENDORF: We are requesting that—I'm not sure how many copies of this I'll need.

THE COURT: What is it?

MR. WESENDORF: Order for the transcript.

THE COURT: I think just one. But I'll sign them all. So you're appealing

MR. WESENDORF: Yes.

THE COURT: Who is going to do the appeal?

MR. WESENDORF: I am.

THE COURT: Okay. Well then, I'll appoint the Public Defenders Office to represent Mr. Erickson on appeal.

MR. WESENDORF: Thank you, Judge.

THE COURT: And you're entitled to free transcripts of what occurred during the course of the proceedings in my courtroom.

MR. WESENDORF: Yes. I just need to check and make sure I have the correct dates on there. And I'll be filing the notice of appeal.

THE COURT: This is the notice of appeal I just signed. So, it's filed.

MR. WESENDORF: You need the dates for the transcript?

THE COURT: Yes. So, get it stamped and now I don't have jurisdiction. And I'll see all you guys later.

MR. WESENDORF: Thank you, Judge.

(Which were all the proceedings had in the above-entitled cause, on the aforesaid date)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v.
PAUL S. ERICKSON, Appellant
No. 59058

Supreme Court of Illinois
April 2, 1987, Filed
Modified on Denial of Rehearing October 5, 1987.

JUSTICE MORAN delivered the opinion of the court. JUSTICE GOLDENHERSH took no part in the consideration or decision of this case. JUSTICE SIMON, dissenting. CHIEF JUSTICE CLARK joins in this dissent.

Defendant, Paul Erickson, was charged by information filed in the circuit court of Cook County with the murder of Elizabeth Launer. The information contained additional charges stemming from the incident, for a total of 10 counts. Count one of the information charged intentional murder (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(a)(1)); count two charged knowing murder (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(a)(2)); count three charged felony murder predicated upon rape (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(a)(3)); count four charged rape (Ill. Rev. Stat. 1981, ch. 38, par. 11—1); count five charged unlawful restraint (Ill. Rev. Stat. 1981, ch. 38, par. 10—3); count six charged concealment of a homicidal death (Ill. Rev. Stat. 1981, ch. 38, par. 9—3.1); counts seven through ten charged armed violence predicated upon the prior counts of knowing murder, felony murder, rape, and unlawful restraint, respectively (Ill. Rev. Stat. 1981, ch. 38, par. 33A—2).

Defendant pleaded not guilty. The State indicated that it would seek the death penalty in the event the defendant was

convicted of murder. Before the commencement of trial, the defendant attempted to waive his right to a jury to consider imposition of the death penalty if he were convicted of murder. The court refused defendant's waiver. Defendant then elected to be tried by a jury. At the conclusion of trial, the jury returned general verdicts of guilty on all counts.

Defendant again tendered a waiver of the sentencing jury which was accepted. The sentencing hearing then commenced before the court pursuant to section 9—1(d)(3) of the death penalty statute (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(d)(3)). At the conclusion of the proceeding, judgment was entered on the convictions for murder and concealing a homicidal death. The court merged the conviction of unlawful restraint into the rape conviction and entered judgment thereon. No judgment was entered on the armed-violence counts. The court then sentenced the defendant to death for murder; an extended term of 60 years for rape (Ill. Rev. Stat. 1981, ch. 38, par. 1005—8—2); and a consecutive term of 10 years for concealment of a homicidal death (Ill. Rev. Stat. 1981, ch. 38, par. 1005—8—4(b)). Because the death penalty was imposed, the cause comes directly to this court for review pursuant to Supreme Court Rule 603 (87 Ill. 2d R. 603).

We set forth below only those facts necessary to decide the issues defendant raises before this court.

Testimony given during the State's case in chief established that the body of Elizabeth Launer was found in a retention pond in Rolling Meadows, Illinois, on August 4, 1982. Preliminary examination of the body revealed two stab wounds, one in the chest and one in the abdomen.

Testimony proffered by the State also established that, on the evening of July 30, 1982, the defendant, at the request of a former girlfriend, Lisa Soderberg, provided his car, bought

alcoholic beverages, and rented a motel room at the Rolling Meadows Holiday Inn for a group of five juveniles. The group consisted of Soderberg, Thomas Fairweather, Michael Blanchard, Renee East and the victim, Elizabeth Launer. Later in the evening, East left the motel, leaving the defendant and four juveniles in the room.

Fairweather, testifying for the State, stated that, at approximately 11:30 p.m., the defendant approached him, walked with him outside, and asked whether or not he could keep his "mouth shut" if he knew about a bad crime. Fairweather answered in the affirmative and asked what kind of crime. Fairweather stated that the defendant referred to rape and indicated that he wanted to have sex with Launer. According to Fairweather, defendant said that he would rape her if she did not cooperate with his advances.

Fairweather further testified that he expressed concern about Launer's reporting the rape to the police. The defendant allegedly replied that, after the rape, they would kill her. According to Fairweather, the defendant displayed a knife which he took from underneath the front driver's seat of his car. He also showed Fairweather two neckties and a "rolled up, folded over sock."

Fairweather continued, testifying that the defendant then approached him and Blanchard with the following plan. It would be necessary for Soderberg to leave. According to Fairweather, the defendant suggested that Fairweather provoke an argument with her so that she would get angry and depart. Fairweather testified that the defendant then gave the two ties to Blanchard and the sock to him.

Fairweather stated that the defendant did not want to rape the victim at the motel so the defendant said that the group would leave the motel in his car. Fairweather testified that

the defendant instructed Blanchard to sit in the front seat on the passenger's side next to the victim, who would be seated between him and the defendant. Defendant told Fairweather to sit in the back seat on the passenger's side. On the defendant's signal, Fairweather was to reach over the seat and stuff the sock into Launer's mouth. He and Blanchard would grab Launer, tie her hands with one necktie, and place the other tie over her mouth. According to Fairweather, the defendant said they would "take her clothes off, rape her, kill her and get rid of the body."

Fairweather continued, testifying that, as instructed by the defendant, he did start an argument with Soderberg which caused her to leave and not return. The group, now made up of the defendant, Blanchard, Fairweather, and Launer, then left the motel in the defendant's car positioned according to his instructions.

The defendant drove to an apartment complex in Rolling Meadows, parking in a grassy area behind some tennis courts. Fairweather further testified that the defendant looked back at him and nodded. Fairweather responded by attempting to place the sock in Launer's mouth, but he was unsuccessful.

Fairweather did not see the victim being bound. However, he testified that he saw the defendant pull his knife from under the front driver's seat and begin cutting Launer's clothing. At this point, Fairweather stated that Blanchard left the vehicle. The defendant did not stop but proceeded to remove Launer's clothing.

The defendant laid Launer across the front seat. According to Fairweather, he saw the defendant position himself between her legs. He next heard a zipper being unzipped. He then heard a slap and heard the defendant say "open up, bitch." He also saw the defendant lower himself on top of the victim. A short

while later, Fairweather heard a zip and snap and observed the defendant exit the car. At this point, Fairweather testified that he got into the front seat and was attempting to free Launer when the defendant returned and got into the back seat. Fairweather then "pretended" to have sexual intercourse with Launer. However, he denied having any sexual contact with her.

The defendant then got out of the car, opened the front door, and pulled the victim out of the car. Fairweather picked up her clothes, and the three walked toward the retention pond located close by.

Fairweather testified that the defendant forced Launer to the ground. She was lying on her back and Fairweather was holding her head. Fairweather testified that he saw the defendant pull out the knife, raise his hand, and strike Launer in the chest. He immediately let go of her head and started to walk away, at which point he "heard the knife go into the body again."

He and the defendant threw the body and the clothing into the pond. They returned to the car and, along with Blanchard, left the scene.

Fairweather further testified that the trio went to the home of the defendant's girlfriend, Mickey Jaksch. They woke her up and, according to Fairweather, the defendant told her that he had raped and killed a girl. Jaksch, who later testified as part of the State's case in chief, corroborated Fairweather's testimony as to this admission.

On cross-examination, Fairweather indicated that he too was charged with murder, rape, concealment of a homicidal death, unlawful restraint, and armed violence. He stated that he was charged as a juvenile and that, in return for his testimony, he would plead guilty to one charge, receiving a

sentence of approximately four years, with the possibility of reduction for good time served.

Blanchard also testified for the State. Blanchard stated that he and Fairweather engaged in a conversation initiated by the defendant during which the defendant said that he wanted to have sex with Launer. According to Blanchard, the defendant talked about raping Launer and killing her if she resisted.

Blanchard stated that the defendant initiated another exchange with him and Fairweather. At this time, the defendant gave Fairweather a sock, telling him that he was to reach over the front seat and put the sock in Launer's mouth as a gag. According to Blanchard, the defendant gave him two or three ties which were to be used to bind the victim. Blanchard kept one and returned the others.

Blanchard testified that the group left the motel and drove to an apartment complex. The defendant was driving; he, Blanchard, was seated on the right passenger side; Launer was seated in the middle between the defendant and Blanchard; Fairweather was seated in the back.

Blanchard stated that the defendant parked towards the back of the complex next to some tennis courts and a grassy field. After a short while, Blanchard observed the defendant look into the back seat and nod his head. He observed Fairweather reach over the front seat and attempt to place the sock in Launer's mouth. He was unsuccessful. Blanchard then observed a struggle between the defendant and Launer, but he did not see him either bind or gag her.

Blanchard testified that he then got out of the car and walked about 20 yards away. He further testified that he heard crying and moaning sounds coming from the defendant's car. A short while later, he observed the defendant pull Launer out of the car and watched as the defendant, Fairweather, and

Launer walked into some trees and bushes, at which point he lost sight of them.

Blanchard testified that he heard moaning and sobbing, followed by a scream. A few minutes later, he heard a splash. The defendant and Fairweather then returned and the three left. While driving away, Blanchard stated that the defendant admitted stabbing Launer.

Blanchard continued, testifying that the three drove to the home of Jaksch, the defendant's girlfriend. There, Blanchard heard the defendant tell her that he just killed somebody: "her name was Liz."

On cross-examination, Blanchard stated that he was charged in a juvenile petition with concealment of a homicidal death. He acknowledged that, in return for his testimony, he expected the charge to be dropped.

The defendant was the sole witness in his defense. His testimony materially differed from that of Fairweather and Blanchard, particularly as to whose idea it was to rape and kill Launer and who actually killed her.

The defendant testified that it was Fairweather who wanted to have sex with Launer and, further, that it was Fairweather who said he would rape her if he had to and that "she would never go home again." According to the defendant, Fairweather supplied the sock and the ties, though he admitted that the tie used to bind Launer's hands belonged to his father.

The defendant further testified that he assisted Fairweather and Blanchard in tying up the victim. However, he denied raping her. He testified that he left the car and, when he returned, Fairweather's pants were down. Shortly thereafter, Fairweather got up, pulled up his pants, and the two of them pulled Launer from the car and walked towards the retention pond. There, the victim was told to lie down on the ground.

When she did so, the defendant said that he knelt down and held her feet. The defendant testified that he saw Fairweather strike Launer in the chest with a knife which he admitted belonged to him. He and Fairweather then threw the body and the clothes into the pond and left. The defendant acknowledged going to Jaksch's house. However, according to the defendant, he said only that he was involved in the killing of a girl.

The jury found the defendant guilty on all counts. The matter then proceeded to a death penalty hearing. During the course of the hearing, the court granted a continuance of almost four weeks at the request of defense counsel.

The hearing resumed, and the court found that the defendant was born on February 2, 1957, and was 25 years old at the time of the offense. The court further found beyond a reasonable doubt the existence of one statutory aggravating factor: that the victim was killed in the course of a felony, rape, and that the defendant actually killed the victim. Ill. Rev. Stat. 1981, ch. 38, par. 9—1(b)(6).

The court proceeded to take testimony in aggravation and mitigation. In aggravation, the State presented the testimony of Billy Johnson, who recounted an incident which occurred approximately two weeks before Launer was killed. Johnson testified that he and the defendant, at the defendant's suggestion, went to O'Hare International Airport to pick up a prostitute. Johnson testified that the defendant said they would have to "get rid" of her, meaning they would have to kill the prostitute after having sex. The State also presented the testimony of Leslie Blackstock, who testified that she was raped by Erickson in 1979.

The State also offered the testimony of Rolling Meadows' police detective Greenway, who recounted a conversation he recently had had with Joanne Combs, a former girlfriend of

the defendant. Over defense objection, Greenway testified that Combs told him that the defendant slapped her around, made her pregnant, and threatened to kill her if she told anyone that he was the father. Greenway also testified that Combs said that the defendant had told her he once stabbed a black man to death.

Defendant offered two factors in mitigation: "no significant history of prior criminal activity" and the presence of an "extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution." (Ill. Rev. Stat. 1981, ch. 38, pars. 9—1(c)(1), (2).) In support of the second mitigating factor, defendant offered the testimony and report of Dr. John Weliczko, a psychotherapist. The court refused to qualify Dr. Weliczko as an expert. The court also denied the defendant's motion for a continuance to secure the testimony of an expert, ruling that such additional testimony would be cumulative to that of Dr. Weliczko, which the court would be considering.

The court found, after reviewing all of the evidence in aggravation and mitigation, that there were no mitigation factors sufficient to preclude the imposition of the death penalty. (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(h).) In sentencing the defendant to death, the trial judge made reference to the defendant's parents, stating that, if he could consider their feelings, his judgment would be different.

Defendant raises 16 issues on appeal. Three concern the conduct of the trial, which defendant contends warrants reversal of this conviction and a new trial. Defendant raises nine issues concerning conduct of the death penalty hearing which he contends warrant remand for resentencing. He also raises four issues challenging the constitutionality of the death penalty

statute. We first consider the issues relating to defendant's trial.

Defendant initially contends that he should be granted a new trial because the trial court erred in refusing to accept his pretrial waiver of the sentencing jury. The court further erred, according to the defendant, in permitting the State to question prospective jurors, who would be impaneled to consider the issue of his guilt or innocence, on their views regarding imposition of the death penalty pursuant to *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770.

Defendant relies upon the recent decision of this court in *Daley v. Hett* (1986), 113 Ill. 2d 75, which he characterizes as mandatory and retroactive. It is the defendant's position that *Hett* applies retroactively to his case and affords him the absolute right to waive the capital sentencing jury prior to the commencement of trial on the issue of guilt or innocence. He further contends that, if he exercises this right, *Hett* prohibits the State from questioning prospective jurors regarding the death penalty.

The State responds by arguing that *Hett* holds only that the trial court has the discretion to accept a pretrial waiver. Alternatively, the State maintains that, even if *Hett* requires acceptance of a pretrial waiver, the court's refusal to accept defendant's waiver did not prejudice him because the resultant questioning of prospective jurors regarding the death penalty does not affect the jury's ability to return a fair verdict as to guilt or innocence. Finally, the State argues that *Hett* is not retroactive and, hence, does not govern this case.

We first consider whether or not the trial court is required to accept a defendant's pretrial waiver of the capital sentencing

jury. We note, at the outset, that this was not the issue raise in *Hett*. The precise issue in *Hett* concerned the timing of defendant's waiver of the capital sentencing jury under sectio 9—1(d)(3) of the Criminal Code of 1961, which provides tha the sentencing proceeding in a capital case shall be conducte "before the court alone if the defendant waives a jury for th separate proceeding." (Ill. Rev. Stat. 1981, ch. 38, par. 9– 1(d)(3).) In *Hett*, this court held that the statute permitted th tender of a waiver prior to the commencement of trial. W further held that the statute empowered the trial court to accep a capital defendant's pretrial waiver where the court foun the waiver voluntary and knowing. The defendant in the instan case raises the next logical question but one not raised o addressed in *Hett*. That question is whether or not the tria court is required to accept a voluntary and knowing pretria waiver.

It is the general rule that, if a defendant chooses to waiv a right and the waiver is voluntary and knowing, the waive must be accepted. This is the rule in Illinois with respect t the waiver of the constitutional right to a trial by jury. *Peopl v. Steenbergen* (1964), 31 Ill. 2d 615, 617; *People v. Bradle* (1956), 7 Ill. 2d 619, 622-23, quoting *Patton v. United State* (1930), 281 U.S. 276, 74 L. Ed. 854, 50 S. Ct. 253.

We believe that the same principle governs the waive of statutorily created rights such as the right here in issue. W therefore hold that, where a pretrial waiver of the sentencin jury is tendered and the court ascertains that it is voluntar and knowing, it must be accepted.

Defendant raises another issue also not decided in *Het* He contends that a pretrial waiver of the sentencing jur

prohibits the State from posing questions to prospective jurors concerning their views about the death penalty.

This court observed in *Hett* that the State's right to pose death-penalty questions to prospective jurors "does not come into effect where *** the jur[y] that consider[s] the issue of guilt will not consider eligibility for the death penalty." (*Daley v. Hett* (1986), 113 Ill. 2d 75, 82.) Thus, the court let stand decisions which precluded the State from posing its death-penalty questions. We do not decide this issue left open in *Hett* because we believe that, even if *Hett* were read to prohibit death-penalty questioning of prospective jurors where the sentencing jury is waived prior to trial, it would not apply retroactively to defendant's case.

Judicial opinions announcing new constitutional rules applicable to criminal cases are retroactive to all cases pending on direct review at the time the new constitutional rule is declared. (*Griffith v. Kentucky* (1987), 479 U.S. 314, __, 93 L. Ed. 2d 649, 661, 107 S. Ct. 708, 716.) In *Griffith*, the Supreme Court ruled that its decision in *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712, "applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Batson* held that a criminal defendant could attack a prosecutor's racially motivated use of peremptory challenges in his own trial without establishing a case-by-case history of racially motivated peremptory challenges.

Our reading of *Griffith* leads us to conclude that retroactivity is triggered when two factors are present: (1) the case to which the new rule is to be applied was not final or was pending on direct review when the rule was declared and (2) the rule to be applied retroactively is of constitutional

dimension. As defendant's case was pending on direct review when *Hett* was decided, the retroactive impact of *Hett* depends only upon the applicability of the second factor to his case.

The right to a sentencing jury in a capital case is a statutory, not a constitutional, right. This general rule was reaffirmed recently by the Supreme Court in *Spaziano v. Florida* (1984), 468 U.S. 447, 464, 82 L. Ed. 2d 340, 355, 104 S. Ct. 3154, 3165, where the court held "that the Sixth Amendment does not require jury sentencing." Also in *Spaziano*, the court reiterated its position that it was "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." (468 U.S. 447, 464, 82 L. Ed. 2d 340, 355, 104 S. Ct. 3154, 3165.) On the authority of *Spaziano*, it is apparent that the *Hett* decision concerned a statutory right and that the rule announced therein is of statutory, not constitutional, dimension. Because *Griffith* addresses a rule which pertains to a constitutional right and the defendant herein seeks retroactive application of a rule which pertains to a statutory right, we do not deem *Griffith* controlling.

We also do not believe that *Griffith* controls the retroactive application of a newly announced rule of criminal procedure which in no way implicates the fundamental fairness or the truth-seeking effectiveness of a defendant's trial on the issue of guilt or innocence. In cases such as *Hett* where the announced rule is statutory in origin and purely procedural in effect, we believe that the proper test of retroactivity is the three-pronged test set forth in *Stovall v. Denno* (1967), 388 U.S. 293, 297, 18 L. Ed. 2d 1199, 1203, 87 S. Ct. 1967, 1970, and reaffirmed in *Solem v. Stumes* (1984), 465 U.S. 638, 642-50, 79 L. Ed. 2d 579, 586-91, 104 S. Ct. 1338, 1341-45. It is to be noted that the three-pronged *Stovall* analysis was adopted and applied

by this court in *People v. Laws* (1981), 84 Ill. 2d 493, 498-501. We are persuaded of the continued validity of the *Stovall* analysis of retroactivity in cases involving a statutory rule of criminal procedure, such as the statutory right to waive the sentencing jury here in issue, which is unrelated to fundamental fairness and the truth-seeking function of a trial.

The *Stumes-Denno* analysis considers the following three factors in determining whether or not a decision announcing a new rule of law will be applied retroactively: (1) the purpose of the new rule, particularly whether or not it enhances the truth-seeking process; (2) the extent to which law-enforcement officials relied upon a prior rule of law supplanted by the new rule; and (3) the effect on the administration of justice of the retroactive application of the newly announced rule. Applying the first factor, the defendant has made no showing that the jury's truth-seeking function in his case would be aided in any way by holding *Hett* retroactive insofar as it could be read to prohibit death-penalty questioning of jurors after a pretrial waiver of the sentencing jury has been accepted. Unless it can be shown that a prohibition against such questioning bears directly on the jury's truth-seeking role, retroactivity is not favored. Indeed, since *Hett* addressed only the timing of a waiver of the sentencing jury, it is unrelated to the truth-seeking role of the jury impaneled to decide a defendant's guilt or innocence.

The second element of the *Stumes-Denno* test concerns the reliance of law-enforcement officials on an old rule of law replaced by a new rule of law. This element is inapplicable where, as here, the rule of law is new and does not replace a prior rule.

The final element of the *Stumes-Denno* test requires that we consider the impact of *Hett* on the administration of justice if it were applied retroactively. Any evaluation of the impact on the administration of justice would be dependent, in part, upon whether or not death penalty questioning, in alleged violation of *Hett*, warrants retrial. Obviously, defendant, in seeking a new trial, espouses this construction of *Hett*. If defendant is correct, the retroactive application of *Hett* might well place a severe strain on the administration of justice because of the cost in judicial resources required to retry all cases in which a pretrial waiver of the sentencing jury was rejected and prospective jurors questioned concerning imposition of the death penalty.

Defendant has made no showing that the impact on the judicial system occasioned by retrials resulting from the retroactive application of *Hett* would be manageable. In the absence of such a showing, we will not assume either a minimal or a manageable impact only to discover, perhaps too late, a judicial system straining to accommodate a large number of retrials while attempting, at the same time, to perform its usual tasks effectively and efficiently.

We believe, therefore, that the retroactive application of *Hett*, insofar as it can be read to prohibit death-penalty questioning subsequent to acceptance of a pretrial waiver of the sentencing jury, would place an unacceptable burden upon the administration of justice without achieving a corresponding increase in the jury's ability to fairly and effectively arrive at the truth. For these reasons, we hold that *Hett* is not retroactive. Defendant is not entitled to a new trial either because he was unable to waive the sentencing jury prior to trial or because

the State was allowed to query prospective jurors concerning imposition of the death penalty.

It is clear as well that, unless the defendant can demonstrate that the death questioning of prospective jurors produced an unfair jury, he would fare no better if we were to hold *Hett* retroactive. It is well established that a jury questioned regarding imposition of the death penalty is presumed to be a fair jury on the issue of guilt or innocence. (*Buchanan v. Kentucky* (1987), 483 U.S. __, __, 97 L. Ed. 2d 336, 350, 107 S. Ct. 2906, 2913; *Lockhart v. McCree* (1986), 476 U.S. 162, 184, 90 L. Ed. 2d 137, 154-55, 106 S. Ct. 1758, 1770; *Wainwright v. Witt* (1985), 469 U.S. 412, 419-22, 83 L. Ed. 2d 841, 849-53, 105 S. Ct. 844, 850-53.) Our cases are in accord. *People v. Free* (1983), 94 Ill. 2d 378, 401; *People v. Tiller* (1982), 94 Ill. 2d 303, 321-22; *People v. Lewis* (1981), 88 Ill. 2d 129, 147.

Defendant has made no showing which would overcome this presumption. Therefore, the questioning of defendant's jury did not violate his right to trial by a fair and impartial jury. Defendant is not entitled to a new trial even if *Hett* were applied retroactively.

Defendant also seeks a new trial because the trial court failed to dismiss or admonish three jurors who heard allegedly prejudicial remarks given during the *voir dire* of a prospective juror who subsequently was excused for cause. Defendant complains of the following comments.

> "Just some of the people I come into contact [with] were former State's Attorneys or former Assistant Attorney Generals and things like that, and they have made comments about cases that are serious cases such as this one that are brought before the court.
>
> ***

*** I guess what I am getting at is that they made the comments that until they thought they had some cases that they would plea bargain, or their knowledge is***that they wouldn't try a case until they had a 'locked solid case.'"

The State contends that this issue was waived because it was not raised as error in defendant's motion for a new trial. On the merits, the State maintains that the remarks complained of were not prejudicial.

The State is correct that the defendant did not raise this issue in his motion for a new trial. However, the record reveals that this issue was contested vigorously by defense counsel during *voir dire* and, if the remarks were prejudicial, the seating of the jurors who heard them might well undermine the jury's ability to reach a verdict solely on the evidence presented. We therefore consider the merits.

We believe that *People v. Del Vecchio* (1985), 105 Ill. 2d 414, 428-29, *cert. denied* (1985), 474 U.S. 883, 88 L. Ed. 2d 173, 106 S. Ct. 204, is dispositive. In *Del Vecchio*, a prospective juror during *voir dire*, in response to a question as to whether or not she had an opinion about the defendant's guilt, answered, "I think the guy shouldn't be out walking the streets." This juror was excused, but the remaining veniremen who had heard the remark were neither interrogated nor admonished about it. The court in *Del Vecchio* refused to conclude that the mere hearing of this comment precluded the jury from reaching a verdict based solely on the evidence placed before it.

We believe that the comment in *Del Vecchio* would more likely affect a jury's impartiality than the comment here in issue. Yet, the *Del Vecchio* court did not find the comment prejudicial. In the instant case and with respect to a less disturb-

ing remark, we also conclude that the remark in question was not prejudicial. The trial court did not err in seating the three jurors without admonishment.

Defendant next contends that he was denied a trial by a jury representing a fair cross-section of the community because prospective jurors were queried about their views on imposition of the death penalty. Defendant asserts that a jury so questioned is biased towards conviction. Apparently, it is defendant's position that the resulting jury is conviction prone and does not represent the full range of beliefs in the community regarding the death penalty. Because all views are not represented, he contends, the fair–cross-section requirement of the sixth amendment is violated. He concludes that he should be granted a new trial.

The recent cases of *Buchanan v. Kentucky* (1987), 483 U.S. ___, 97 L. Ed. 2d 137, 107 S. Ct. 2906, and *Lockhart v. McCree* (1986), 476 U.S. 162, 184, 90 L. Ed. 2d 137, 154-55, 106 S. Ct. 1758, 1770, resolve this issue against the defendant. In both *Buchanan and McCree*, the Supreme Court held that the composition of a jury impaneled after being questioned about imposition of the death penalty does not violate the fair–cross-section requirement of the sixth amendment even if the jury were conviction prone.

Our cases are in accord with *Buchanan and McCree*. (*People v. Neal* (1985), 111 Ill. 2d 180, 197, *cert. denied* (1986), 476 U.S. 1165, 90 L. Ed. 2d 733, 106 S. Ct. 2292; *People v. Caballero* (1984), 102 Ill. 2d 23, 45, *cert. denied* (1984), 469 U.S. 963, 83 L. Ed. 2d 298, 105 S. Ct. 362.) It is clear that death penalty questioning of prospective jurors does not implicate the fair cross-section requirement of the

sixth amendment. The trial court did not err in permitting such questioning.

We find no error in the conduct of defendant's trial and, therefore, affirm his convictions. We turn now to a consideration of the issues related to defendant's sentencing hearing.

Defendant claims error in the admonishment given him by the court prior to accepting his waiver of the capital sentencing jury. In explaining the role of the sentencing jury, the court stated:

> "Do you understand that the verdicts of the jury in the case of determining whether or not the death penalty would be imposed must be a unanimous verdict just as their verdict as to your guilt or innocence had to be unanimous?
>
> That means all twelve jurors must conclude that the punishment should be death before the death penalty could be imposed in this case."

The defendant maintains that the error in the foregoing admonishment was the court's failure to indicate that the death penalty could not be imposed if only a single juror believed that there were sufficient mitigating factors to preclude imposition of the death penalty.

The State again argues that this issue was waived because it was not included in defendant's motion for a new trial. Alternatively, the State argues that the foregoing admonishment was correct as a matter of law and, therefore, defendant's waiver of the sentencing jury was valid. We agree.

This court has expressed a preference for just such an admonishment as was given to the defendant. (*People v. Albanese* (1984), 104 Ill. 2d 504, 536, *cert. denied* (1985), 471 U.S. 1044, 85 L. Ed. 2d 335, 105 S. Ct. 2061.) Further, this court has approved admonishments substantially similar

to the one given in this case. *People v. Morgan* (1986), 112 Ill. 2d 111, 140-41; *People v. Brownell* (1980), 79 Ill. 2d 508, 536-37, *cert. dismissed* (1980), 449 U.S. 811, 66 L. Ed. 2d 14, 101 S. Ct. 59.

We have never imposed a requirement that a valid admonition must include an explanation that a single juror's belief is sufficient to preclude imposition of the death penalty. We decline defendant's invitation to establish such a requirement. In our view, the admonition given to the defendant was painstaking, extensive, accurate, and without error.

Defendant next argues that he should receive a new sentencing hearing because the court refused to allow him to call two jurors who would testify that the jury convicted the defendant as an accomplice, not as a principal. He contends that this testimony would establish that he is ineligible for the death penalty.

The State responds that this issue was waived for failure to raise it as error in defendant's motion for a new trial. Alternatively, the State contends that where, as here, the sentencer finds that the defendant actually and intentionally killed the victim, it is of no legal significance that the jury considering the issue of guilt or innocence might have convicted the defendant as an accomplice. In support of its position, the State cites the recent Supreme Court decision of *Cabana v. Bullock* (1986), 474 U.S. 376, 88 L. Ed. 2d 704, 106 S. Ct. 689.

We have reviewed *Bullock* and agree that it is dispositive of this issue. In *Bullock*, the defendant was convicted of murder as an accomplice under a State statute which permitted a finding of guilt in the absence of any conduct by the defendant contributing to the victim's death. Under the statute, the

conviction of an accomplice for murder could be based solely upon a finding beyond a reasonable doubt that he or she participated in the underlying felony. Bullock was found guilty of robbery, the predicate felony, as an accomplice. His complicity in the underlying felony provided the basis for his conviction for murder. Subsequently, Bullock was sentenced to death.

The Supreme Court vacated Bullock's death sentence, reaffirming prior holdings that the death penalty could not be imposed upon an accomplice unless he or she "actually killed, attempted to kill, or intended that lethal force be used." (*Cabana v. Bullock* (1986), 474 U.S. 376, 390, 88 L. Ed. 2d 704, 719, 106 S. Ct. 689, 699.) However, the Supreme Court refused to hold that this finding must be made by the jury which considers the issue of guilt or innocence. The court concluded only that "at some point in the [State-court] process, the requisite factual finding as to the defendant's culpability [must be] made." 474 U.S. 376, 387, 88 L. Ed. 2d 704, 717, 106 S. Ct. 689, 697.

We have examined the record of the death penalty proceeding in this case in light of *Bullock* and conclude that the "requisite factual finding as to the defendant's culpability" was made by the court sitting as the sentencer. Thus, the court stated, "the victim here *** was actually killed by the [d]efendant, *** not by any other party. He killed her intentionally." Here, the sentencer made the requisite finding of culpability. Therefore, it is unnecessary to inquire on what basis the jury convicted the defendant. Furthermore, defendant's attempt to call jurors at his sentencing hearing amounts to an attempt to impeach the verdict of guilt. However, the general rule, long recognized in Illinois, is that statements by members of a jury cannot be utilized to explain or alter the meaning or effect of its verdict. (*Chalmers v. City of Chicago* (1982), 88 Ill. 2d

532, 539-40.) Clearly, the defendant is impermissibly trying to explain or alter the meaning of the verdict of guilt entered against him contrary to the rule of *Chalmers*. We therefore conclude that the court did not err in refusing to allow the defendant to call jurors to testify at his death penalty hearing.

Defendant next challenges the admission of the testimony of three witnesses presented by the State during the aggravation and mitigation phase of the death penalty proceeding. Defendant first challenges the admission of Johnson's testimony regarding the incident at O'Hare Airport and defendant's comment that, after having sexual relations with a prostitute, she would have to be "gotten rid of."

Defendant argues that this testimony is not a reliable indicator of his intent to use force against another person. He also argues that this testimony cannot be deemed reliable because Johnson testified that he did not believe the defendant's comments about "getting rid of" a prostitute.

The State again urges that this issue was waived because not preserved for review. As to the merits, the State maintains that Johnson's testimony was reliable. According to the State, the defendant and Johnson actually went to O'Hare. In addition, it is undisputed that the defendant made the statements attributed to him by Johnson about picking up a prostitute, having sex, and, then, killing her. Finally, the State points out that Johnson gave unimpeached testimony that the defendant displayed a knife in conjunction with making the statements about killing a prostitute. The State also notes that the reliability of Johnson's testimony is not affected by whether or not he personally believed the defendant.

It is well settled that the standard for admissibility of evidence proffered during the aggravation and mitigation phase of a death penalty hearing is relevance and reliability. (*People*

v. Perez (1985), 108 Ill. 2d 70, 88, *cert. denied* (1986), 474 U.S. 1110, 88 L. Ed. 2d 931, 106 S. Ct. 898; *People v. Brisbon* (1985), 106 Ill. 2d 342, 364, *cert. denied* (1985), 474 U.S. 908, 88 L. Ed. 2d 241, 106 S. Ct. 276.) Applying this standard, we conclude that Johnson's testimony was relevant and reliable.

The record indicates that the incident recounted by Johnson not only occurred but transpired only a few weeks prior to the events which culminated in Launer's rape and stabbing death. Further, the statements which Johnson attributed to the defendant parallel testimony given during the State's case in chief regarding statements the defendant made about raping and killing Launer. It is clear that Johnson's testimony was relevant.

We also believe that this testimony was reliable. Johnson was cross-examined, yet he remained unimpeached. The fact that Johnson did not believe the defendant is irrelevant to whether or not defendant made the statements, particularly where the comments were made in conjunction with conduct consistent with the plan articulated thereby. On this record, we find no error in the admission of Johnson's testimony.

Defendant also contests the admission of the testimony of Blackstock, who testified that the defendant raped her in 1979. Defendant argues that the court erred in admitting this testimony as evidence of criminal activity since the court acknowledged that it might not have been sufficient to prove him guilty beyond a reasonable doubt had he been tried for rape.

The State contends that defendant has waived this issue. On the merits, the State argues that Blackstock's testimony was relevant and reliable and, hence, admissible. We agree.

Rape was one of the offenses with which the defendant was charged and convicted. Blackstock testified that he raped her. Manifestly, her testimony in this regard is relevant in aggravation. As to its reliability, Blackstock was cross-examined and her testimony remained unchanged. Therefore, the court was warranted in considering her testimony reliable. We conclude the court did not abuse its discretion in admitting Blackstock's testimony.

Defendant next challenges the admission of Detective Greenway's double hearsay testimony in aggravation. Greenway testified that one of defendant's former girlfriend's told him that the defendant had threatened to kill her and also told her that he once had stabbed a black man to death. Defendant argues that this double hearsay is unreliable and that the court abused its discretion in admitting it.

The State responds that reliance and relevance are the sole factors governing admissibility of evidence in the aggravation and mitigation phase of the death penalty proceeding. The State concludes, therefore, that the double hearsay characterization of Greenway's testimony is of no legal consequence. Apparently conceding the possibility that Greenway's testimony was unreliable, the State contends that where, as here, the court alone determines the sentence, the court "is presumed to have considered only properly admitted evidence." *People v. Eddmonds* (1984), 101 Ill. 2d 44, 66, *cert. denied* (1984), 469 U.S. 894, 83 L. Ed. 2d 207, 105 S. Ct. 271.

This court has admitted hearsay testimony in aggravation, concluding that the hearsay nature of the testimony goes to the weight, rather than the admissibility, of the testimony. (*People v. Montgomery* (1986), 112 Ill. 2d 517, 533.) We note, however, that where this court has sanctioned the admission of double hearsay at least some parts of the double hearsay

have been corroborated by other evidence. *People v. Perez* (1985), 108 Ill. 2d 70, 86-87.

The record of the death penalty proceeding in this case does not reveal corroboration of any portion of Greenway's testimony, therefore raising at least a question as to its reliability. However, we observe that the court did not cite Greenway's testimony in announcing the factors it considered in aggravation. Absent a contrary showing, we believe that the court "considered only properly admitted evidence" in pronouncing sentence. *People v. Eddmonds* (1984), 101 Ill. 2d 44, 65-66. See also *People v. Miller* (1964), 30 Ill. 2d 110, 115.

Defendant next claims that the court abused its discretion when it refused to grant him a continuance in order to secure expert testimony as to the presence of mitigating factors. During the aggravation and mitigation stage of the proceedings, defendant attempted to qualify Dr. John Weliczko as an expert and to introduce his testimony and report regarding the statutory aggravating factor that he "was under the influence of extreme mental or emotional disturbance" at the time of the murder. (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(c)(2).) On motion of the State, the court refused to qualify Dr. Weliczko as an expert, ruling that he did not qualify for such treatment under section 102—21 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 102—21). However, the court indicated that it would allow Dr. Weliczko to testify as to his "opinion relative to any mental illness or emotional disturbance that he believes the defendant to possess or has possessed." Further, the court accepted into evidence Dr. Weliczko's written evaluation of the defendant. The trial judge also stated that he would "receive and would weigh [Dr. Weliczko's] testimony along with all the other factors that [he was] required to weigh

under the law." In denying defendant's motion for a continuance, the court observed that the defendant already had received a continuance of approximately four weeks. Finally, the court indicated that additional testimony would be cumulative to that of Dr. Weliczko.

It is defendant's position that the testimony of Dr. Weliczko, considered by the court as lay testimony rather than as expert testimony, was not treated with the same deference as the testimony given by the State's expert witness. Hence, he argues that he was not afforded an adequate opportunity to present evidence in mitigation. Therefore, he concludes that he was denied a fair sentencing hearing.

We believe that defendant's position is without merit. First, defendant had the advantage of a four-week continuance, granted at his request, during which to prepare his case in mitigation. He clearly had ample time to seek out additional experts to testify when the sentencing hearing reconvened. He did not avail himself of this opportunity. Thus, any surprise occasioned by the court's refusal to qualify Dr. Weliczko as an expert is diminished by defendant's failure to use the four-week continuance to bolster his case in mitigation. Moreover, the court expressly indicated that it accepted and would weigh both Dr. Weliczko's testimony and report. On this record, we conclude that the court did not abuse its discretion in refusing to grant a continuance.

Defendant claims that the court, in sentencing him to death, erred in considering his lack of remorse as an aggravating factor. The State contends that defendant's lack of remorse is a proper factor to consider.

This court has held that a "defendant's [lack of] remorse is a proper subject for consideration at sentencing." (*People v. Neal* (1985), 111 Ill. 2d 180, 196. See also *People v. Ward*

(1986), 113 Ill. 2d 516, 527-33; *People v. Morgan* (1974), 59 Ill. 2d 276, 282.) Consequently, the court did not err in taking into account defendant's lack of remorse.

Defendant also challenges his sentence as inappropriate and excessive in light of the four-year term apparently facing Fairweather, the juvenile accomplice in this case. Defendant relies on *People v. Gleckler* (1980), 82 Ill. 2d 145, in which this court vacated a death sentence as disproportionate to the lengthy term of imprisonment given to another participant in the crime.

The State maintains that *Gleckler* is inapposite because, unlike the defendant in the instant case, Gleckler had "the personality of a door mat, and a problem with alcohol, [and] was not the ringleader in this sordid affair." (82 Ill. 2d 145, 171.) We are persuaded by the State's position.

We believe that *Gleckler* is distinguishable from defendant's case. Unlike *Gleckler*, there is ample evidence establishing that defendant conceived the plan resulting in the rape and killing of Launer; actively sought out and involved the juvenile accomplice in his plan; furnished the murder weapon; and orchestrated the efforts to conceal the body and dispose of the evidence. Given the role of the defendant, which was fully supported by the evidence adduced at trial, defendant's sentence reflected the extent of his participation.

Defendant also contends that his sentence constitutes cruel and unusual punishment because the court refused to consider sympathy for defendant's parents as a mitigating factor. At the conclusion of the sentencing hearing, the court said "[m]y heart goes out to the Erickson seniors and if my judgment in any way in this case could take into consideration *their feelings*, the judgment no doubt would be different. But, I cannot, no

more than I could take into consideration perhaps the feelings of the victim's family, the Launers, as they sit here today because that would not be justice either." (Emphasis added.)

We believe that this comment reflects the court's concern that "mere sympathy" unrelated to the circumstances of the crime or to the history and character of the defendant is not a constitutionally relevant factor in determining the appropriate sentence in a capital case. The court's view is correct in light of two recent Supreme Court capital-sentencing decisions which considered the role of sympathy both as an aggravating and a mitigating factor. In *Booth v. Maryland* (1987), 482 U.S. ___, ___, 96 L. Ed. 2d 440, 452, 107 S. Ct. 2529, 2536, the court held unconstitutional the use of victim impact evidence in the aggravation phase of a capital-sentencing proceeding. The court indicated that such evidence is often emotionally charged and concluded that its use was "inconsistent with the reasoned decisionmaking *** require[d] in capital cases." Also, in *California v. Brown* (1987), 479 U.S. 538, ___, 93 L. Ed. 2d 934, 938, 107 S. Ct. 837, 838, the court upheld an instruction which cautioned the sentencing jurors that they "'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling' ***." The court concluded that this instruction was useful in insuring that the death penalty, if imposed, is based on the facts of the crime and the character of the defendant rather than on "extraneous emotional factors." (479 U.S. 538, ___, 93 L. Ed. 2d 934, 939, 941, 107 S. Ct. 837, 840.) We therefore hold that the trial court did not err in declining to consider sympathy for the defendant's parents in imposing the death penalty upon the defendant.

We have reviewed all of the issues defendant raises regarding his sentencing hearing and find no error. We turn now

to defendant's four challenges to the constitutionality of Illinois' death penalty statute.

Defendant first argues that the death penalty statute is unconstitutional because it vests arbitrary discretion in the State's Attorney to seek the death penalty. This issue has been resolved against the defendant by prior cases of this court. (*People v. Madej* (1985), 106 Ill. 2d 201, 211, *cert. denied* (1985), 474 U.S. 935, 88 L. Ed. 2d 274, 106 S. Ct. 268; *People v. Stewart* (1984), 104 Ill. 2d 463, 498-99, *cert. denied* (1985), 471 U.S. 1120, 86 L. Ed. 2d 267, 105 S. Ct. 2368.) We continue to adhere to these decisions.

Defendant also maintains that the death penalty statute is unconstitutional because it does not require that the prosecution prove beyond a reasonable doubt the absence of mitigating factors sufficient to preclude imposition of the death penalty. Again we observe that this precise issue has been raised repeatedly and resolved against the defendant. (*People v. Perez* (1985), 108 Ill. 2d 70, 96; *People v. Del Vecchio* (1985), 105 Ill. 2d 414, 444; *People v. Eddmonds* (1984), 101 Ill. 2d 44, 68; *People v. Kubat* (1983), 94 Ill. 2d 437, 504, *cert. denied* (1983), 464 U.S. 865, 78 L. Ed. 2d 174, 104 S. Ct. 199.) Defendant offers no new argument on this point, instead asking that we reconsider our prior holdings. We decline this invitation and reaffirm these holdings.

Defendant further challenges the constitutionality of the death penalty because it does not require the sentencer to determine that death is the appropriate punishment. We have considered this position on other occasions and rejected it. (*People v. Walker* (1985), 109 Ill. 2d 484, 508-09; *People v. Del Vecchio* (1985), 105 Ill. 2d 414, 444.) Since the defen-

dant presents no new argument, we reaffirm this court's prior holdings on this issue.

Defendant's final contention is that the death penalty statute is unconstitutional because it does not provide a procedure whereby a sentence of death is reviewed to ascertain whether or not it is proportional to the penalty given in similar cases. This argument has been reviewed thoroughly by this court and rejected. (*People v. Walker* (1985), 109 Ill. 2d 484, 508; *People v. Silagy* (1984), 101 Ill. 2d 147, 161, *cert. denied* (1984), 469 U.S. 873, 83 L. Ed. 2d 156, 105 S. Ct. 227.) Moreover, this argument has been considered and rejected by the Supreme Court as well. (*Pulley v. Harris* (1984), 465 U.S. 37, 44-51, 79 L. Ed. 2d 29, 36-41, 104 S. Ct. 871, 76-80.) Therefore, we adhere to our prior holdings on this issue.

For the reasons stated herein, we affirm the judgment of the circuit court of Cook County. The clerk of this court is directed to enter an order setting Tuesday, September 15, 1987, as the date on which the sentence of death entered in the circuit court is to be implemented. The defendant shall be executed by lethal injection in the manner provided by section 119—5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 119—5). A certified copy of the mandate of this court shall be transmitted by the clerk of this court to the Director of Corrections, to the warden of the Stateville Correctional Center, and to the warden of the institution wherein defendant is confined.

Judgment affirmed.

JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

JUSTICE SIMON, dissenting:

The defendant in this case attempted to waive a jury for the penalty phase prior to his trial in order to avoid having prospective jurors death-qualified or "Witherspooned." The waiver was refused, and the jury was Witherspooned. The defendant tendered another waiver after the guilt phase, which was accepted, and the judge alone sat at the sentencing hearing. The question which the majority opinion does not and, I think, cannot answer is what legitimate purpose there could be for death-qualifying a jury which will have nothing to do with sentencing. We recognized the impropriety of such a practice and resolved this problem on June 20, 1986, in *Daley v. Hett* (1986), 113 Ill. 2d 75, yet in this case the court eviscerates *Hett*, leaving it without meaning. After this decision all we know is that the defendant has the right to waive his sentencing jury before trial, but we are left wondering why he would ever want to do so if such a waiver does not preclude *voir dire* questioning designed to put the death penalty question at the forefront of the jurors' minds.

The majority opinion offers up a veritable shopping list of alternative reasons why the defendant is not entitled to a new trial under *Hett*. It first suggests, for example, that *Hett* did not decide that a trial judge must accept a knowing and intelligent pretrial waiver of the jury for sentencing. Instead, says the majority, the court only held that a trial judge has discretion to accept a pretrial waiver.

This conclusion misreads *Hett*. The waiver question there was phrased in terms of the trial court's ability to accept a pretrial waiver only because of the procedural posture in which the case arose—attempts by the State to compel two judges to refuse pretrial sentencing jury waivers. But the holding and the rationale of *Hett* made clear that the defendant is "accorded

the right" (*Daley v. Hett* (1986), 113 Ill. 2d 75, 82) to waive a sentencing jury at any time under the "clear and unambiguous" (113 Ill. 2d 75, 81) language of the Criminal Code of 1961. Nothing in our opinion suggested that the decision to accept a knowing and intelligent waiver was discretionary; indeed, it is obvious that there could be no basis for the exercise of such discretion. On what ground other than judicial caprice could a judge refuse a knowing and intelligent waiver? This court's decision in *People v. Shum* (1987), 117 Ill. 2d 317, correctly explains *Hett* as holding that the "defendant had a right to execute a jury waiver for the penalty phase of the trial prior to the commencement of the guilt phase" (117 Ill. 2d 317, 338). After *Hett*, the majority's conclusion in this case that the judge must accept a voluntary pretrial waiver of a sentencing jury, as he must accept voluntary waivers of other rights, is merely redundant.

Consistent with its stinted reading of *Hett* on the waiver issue, the majority asserts that the propriety of death-qualifying a jury which has been waived for sentencing was "also not decided in *Hett*" (117 Ill. 2d at 288). This is difficult to square with the court's holding in *Hett* that the State's "right under *Witherspoon* does not come into effect where, as here, the juries that consider the issue of guilt will not consider eligibility for the death penalty." (*Daley v. Hett* (1986), 113 Ill. 2d 75, 82.) How this language suggests that the Witherspooning issue has been "left open" (117 Ill. 2d at 288), I cannot understand. As I read *Hett*, we specifically held that the State had no legitimate reason for Witherspooning a jury which had been waived for sentencing.

Whether or not the court admits that the question has already been decided, the answer seems beyond dispute: no

justification can be advanced to permit death-qualifying a jury which will not sit at the penalty phase. If such *voir dire* were permitted in capital cases in which the jury does not pass sentence, why not also in noncapital cases? In both situations, the jurors' attitudes on the death penalty are immaterial to the only issue they will consider—guilt or innocence—and yet any attempt to Witherspoon a jury in, for example, a simple burglary case (for which the death penalty is not available) would certainly be denounced as improper.

Rather than meet the question supposedly left open, the court retreats to the refuge of nonretroactivity, holding that even if *Hett* means what it clearly says, the rule would not apply to the defendant's case in which *voir dire* predated our decision in *Hett*. This bit of maneuvering unfortunately leaves the issue in a state of limbo so that even in the future trial courts will have no clear guidance as to whether we are for or against Witherspooning in this situation. The court's vacillation here, taken together with the decision in *Hett*, implies that a judge may exercise discretion as to whether or not to permit Witherspooning of a jury voluntarily waived for sentencing prior to trial. There are no standards, though, guiding this determination, and thus "discretion" here is reduced to no more than the whim of the trial judge. Without a uniform, even-handed procedure we can certainly expect additional petitions for *mandamus* in future capital cases until this matter is finally resolved. For this reason alone I would not avoid the question here.

More importantly, no question of retroactivity is even involved here. The majority does not appear to dispute the general rule that judicial decisions apply retroactively (*Solem v. Stumes* (1984), 465 U.S. 638, 642, 79 L. Ed. 2d 579, 586,

104 S. Ct. 1338, 1341), yet the court fails to advance any reason why this case should fall outside that rule. The question of retroactivity only arises when there has been a change in the law. *Swisher v. Duffy* (1987), 117 Ill. 2d 376, 380; *People v. Britz* (1986), 112 Ill. 2d 314, 318-19.

There has been no change in the law here. In *Hett*, we described the statutory provision under which a defendant is permitted to waive a sentencing jury at any time as "clear and unambiguous" (*Daley v. Hett* (1986), 113 Ill. 2d 75, 81). Since, as *Hett* also recognized, it makes no sense to death-qualify a jury which will have nothing to say about the death penalty, it should have been equally plain that Witherspooning was impermissible. Prior to our *Hett* decision several of our able circuit judges recognized this and refused to Witherspoon such juries. (See, *e.g.*, *Daley v. Hett* (1986), 113 Ill. 2d 75 (Judges Hett and Carey); *People v. King* (1986), 109 Ill. 2d 514, 543-45 (Judge Miller); People ex rel. Daley v. Strayhorn (June 20, 1986), No. 63498 (Judge Strayhorn); People ex rel. Daley v. Stein (June 5, 1985), No. 61980 (Judge Stein).) The fact that this court had never specifically ordered trial judges to comply with what was obviously the law does not mean that when we finally spoke on the issue the law was changed. There is no reason to rule upon a retroactivity issue where none exists.

Even assuming that we should consider whether the *Hett* rule is to be applied retroactively, there is no justification for belatedly dredging up the discredited analysis of *People v. Laws* (1981), 84 Ill. 2d 493, which was torpedoed by this court in *People v. Martine* (1985), 106 Ill. 2d 429. *Laws* adopted the three-part test articulated in *Stovall v. Denno* (1967), 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967, to find that a new rule of fourth amendment law could not be applied

retroactively even on direct review. Subsequent to our decision in *Laws*, the United States Supreme Court considered the retroactivity of another new fourth amendment rule in *United States v. Johnson* (1982), 457 U.S. 537, 73 L. Ed. 2d 202, 102 S. Ct. 2579. In *Johnson*, the court rejected the three-part test with respect to cases on direct review and determined that, as to such cases, new principles of fourth amendment law not marking a clear break with the past had to be applied retroactively. Thereafter, in *Martine*, this court was again faced with the retroactivity of the same fourth amendment rule as in *Laws*, and held that "*Laws* can no longer be followed." *People v. Martine* (1985), 106 Ill. 2d 429, 433.

It is difficult to understand how the majority could be "persuaded of the continued validity" (117 Ill. 2d at 290) of *Laws* notwithstanding this history, and despite the fact that the United States Supreme Court has now completely renounced the *Stovall* analysis insofar as it purports to measure the retroactivity of new principles to cases still pending on direct review. (*Griffith v. Kentucky* (1987), 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708.) In *Griffith*, the court abandoned the three-part test and held that new principles of constitutional law must be applied retroactively to all cases still pending on direct review, even if the new rule is a "clear break with the past." The majority's effort to salvage the wreck of the three-part *Laws* analysis in the context of cases on direct review is inconsistent with *Griffith*. Nevertheless, the majority disregards the true sweep of the *Griffith* opinion. Without explanation, the court distinguishes this case on the ground that the *Griffith* rule of automatic retroactivity only applies to cases in which the new principle is one of constitutional law.

Griffith did involve the retroactivity of a new constitutional principle. And I agree that this case does not clearly implicate the retroactivity of a new principle of Federal constitutional law. Neither of these facts, however, justifies the court's summary rejection of *Griffith*. The majority opinion, by ignoring the reasoning of *Griffith*, conveys the impression that *Griffith* was an arbitrary decision and that one rule of retroactivity is as good as another. In my view, the Supreme Court's reasoning in that case was not only compelling, but as applicable in nonconstitutional cases as in constitutional ones.

Griffith was based largely on the Supreme Court's recognition that "the integrity of judicial review requires that we apply [a new] rule to all similar cases pending on direct review." (*Griffith v. Kentucky* (1987), 479 U.S. 314, ___, 93 L. Ed. 2d 649, 658, 107 S. Ct. 708, 713.) The court relied on the view earlier advanced by Justice Harlan:

> "'If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.'" (479 U.S. 314, __, 93 L. Ed. 2d 649, 658, 107 S. Ct. 708, 713, quoting *Mackey v. United States* (1971), 401 U.S. 667, 679, 28 L. Ed. 2d 404, 413, 91 S. Ct. 1160, 1173 (Harlan, J., concurring).)

Denying retroactivity to new nonconstitutional principles, the result sanctioned by the majority in this case, undermines the integrity of the judicial process in precisely the same way: it permits us to adopt a new rule but then to decline to apply the law in a later case. I can see no meaningful difference here

which would justify limiting the rule of automatic retroactivity to constitutional cases. Although relying on a purported distinction between new constitutional principles and other new principles of law, the majority fails to defend the distinction or to explain what significance it has.

The absence of any attempt by the majority to defend this distinction is hardly unexpected since the *Stovall-Laws* test which the majority insists on adhering to suffers exactly the same supposed disability as the *Griffith* rule the court rejects: it, too, is a rule of retroactivity for constitutional principles. The majority does not come to terms with the fact that *Stovall v. Denno* also involved the retroactivity of a new principle of constitutional law, the sixth amendment right to have counsel present at certain out-of-court identifications. Similarly, *Solem v. Stumes* (1984), 465 U.S. 638, 79 L. Ed. 2d 579, 104 S. Ct. 1338, also relied upon by the majority, concerned the retroactivity of a new fifth amendment rule, and *Laws* a new decision under the fourth amendment. If the *Stovall-Laws* test, conceived for and applied to constitutional cases, is not, by reason of its origin and application, inapplicable to nonconstitutional cases, it is logically incoherent for *Griffith* to be rejected because of its creation in a constitutional context.

The majority also suggests that *Griffith* should not apply because the *Hett* rule (if it exists) is "purely procedural" and "is unrelated to fundamental fairness and the truth-seeking function of a trial." (117 Ill. 2d at 290.) There are three crucial flaws in this argument. First, the very point of the *Griffith* decision is that retroactivity with respect to cases still on direct review should not depend "upon the particular characteristics of the new rule adopted by the Court." (479 U.S. 314, ___, 93 L. Ed. 2d 649, 661, 107 S. Ct. 708, 715.) By relying on

the purpose of the *Hett* rule, the majority "reintroduces precisely the type of case-specific analysis" that the Court rejected as inappropriate for cases pending on direct review. 479 U.S. 314,__ , 93 L. Ed. 2d 649, 661, 107 S. Ct. 708, 715.

Second, the majority's reliance on the supposition that the *Hett* rule does not touch the truth-seeking function creates a striking paradox: under the majority's analysis the purpose to be served by the new rule is both a threshold requirement for employing the three-part *Laws* test and the first factor in the test. If the majority is correct in its method of determining the applicability of the *Laws* analysis, *Laws* will actually become a two-part test, since the purpose factor will automatically weigh against retroactivity whenever the test is triggered. The majority's ill-advised effort to avoid *Griffith* makes hash even of the *Laws* balancing test.

Third, the majority's impression that the retroactivity question here concerns the "statutory right to waive the sentencing jury" (117 Ill. 2d at 290) is mistaken. Perhaps confused by its own alternative holdings, the majority has apparently slipped into the error of suggesting that the question is whether that portion of *Hett* requiring a judge to accept a pretrial waiver of the sentencing jury is retroactive. That cannot be the correct question, as examination of the majority opinion makes evident. While incorrectly stating that *Hett* left the waiver question open, the court explicitly holds *in this case* that a judge must accept a knowing pretrial waiver. (117 Ill. 2d at 287.) Only after so holding does the majority turn to the distinct problem of whether a jury properly waived for sentencing in accordance with the statute can nonetheless be death-qualified (117 Ill. 2d at 288). The retroactivity discussion, therefore, is not about the retroactivity of the statutory right to waive the jury, but about the

ability of prosecutors to death-qualify a jury so waived. I cannot agree, for reasons stated later in this opinion, that this issue is either "purely procedural" or one which "in no way implicates the fundamental fairness" (117 Ill. 2d at 289-90) of the trial.

As is obvious from what I have stated thus far, the majority has perceived a retroactivity question where there is none and then it has applied the wrong test of retroactivity. But even assuming the three-part *Stovall* test could be applied, the majority's interpretation of the factors is insupportable. The second factor in the *Stovall* analysis is the extent to which law-enforcement officials have justifiably relied upon a prior rule of law supplanted by the new rule. As the majority admits, this court has never suggested that Witherspooning a jury which would have nothing to do with sentencing is necessary, permissible, or sensible. Nor could any appellate court authority have been relied upon here. Although the appellate court held in *People v. Wolfbrandt* (1984), 127 Ill. App. 3d 836, that a sentencing jury could not be waived prior to conviction, *Wolfbrandt* was filed more than a year after the *voir dire* of the jury in this case.

While the majority acknowledges that *Hett* "does not replace a prior rule" (117 Ill. 2d at 291), it inexplicably draws the conclusion that the reliance factor is therefore "inapplicable" (117 Ill. 2d at 291) here. If the reliance factor is to make any sense, however, the lack of any justified reliance on a prior rule of law — either because the reliance was unjustified in fact or, as in this case, there was nothing for the State or the courts to rely upon—must weigh in favor of retroactivity. Unsurprisingly, the majority has cited no authority for the

proposition that the reliance factor may be neutral or "inapplicable."

Even more puzzling is the majority's use of the third *Stovall* factor, the impact on the administration of justice. Without any factual record whatever, or even any facts of which we could take judicial notice, the court speculates that retroactive application of *Hett* "might well place a severe strain" on the administration of justice. (117 Ill. 2d at 291.) Recognizing that there is nothing to support this conjecture, the majority then thrusts the burden of proving that the impact of *Hett* would be "manageable" (117 Ill. 2d at 291) on the defendant, and finds that the defendant has made no showing that it would be. The majority offers no authority for the suggestion that one who supports retroactivity has any burden of proving its appropriateness, and I know of none. Since the general rule is that judicial decisions apply retroactively, if any burden exists it should rest upon the party seeking to avoid the general rule—the State.

I am at a loss to understand how a defendant on direct appeal of his murder conviction to this court could presume to make such a showing. We have no procedure under which a defendant may engage in discovery while on appeal, and a defendant therefore has no way to obtain the necessary information. By contrast, the relevant factual information is readily available to the State, which must know how many cases are pending on direct appeal in which a jury has been Witherspooned after the defendant waived or tried to waive the jury for the sentencing phase of the proceeding. Since the State has made no such showing, there is no reason to think the retroactive application of *Hett* would disrupt the administration of justice. Given the weakness of the second and third

Stovall factors when applied here, there can be no doubt that even under that test *Hett* should be applied retroactively.

Having already held that *Hett* does not address the propriety of death-qualifying a jury which has been waived and that, even if it did, the rule announced in *Hett* is not to be applied retroactively, the majority finds it necessary to bury *Hett* by precluding any enforcement of the rule on appeal. As the majority sees it, *Hett* was a useless decision which is better ignored than respected because Witherspooning a jury which does not pass sentence does no harm. The majority reads the defendant's argument as merely an objection that exclusion of prospective jurors who state that they could not impose the death penalty violates his fourteenth amendment right to an impartial jury; this position is, of course, foreclosed by *Lockhart v. McCree* (1986), 476 U.S. 169, 90 L. Ed. 2d 137, 106 S. Ct. 1758.

The defendant is not saying, though, that his jury fails to measure up under the United States Constitution, but rather that under Illinois law it is improper to distract the jury with the question of sentencing "[w]here, as in the present case, the jury has nothing to do with fixing the punishment" (*People v. Galloway* (1963), 28 Ill. 2d 355, 362). Whether or not the jury was so unfair as to run afoul of the fourteenth amendment, it seems plain to me that needlessly injecting the emotional and controversial issue of the death penalty into this case inevitably colored the jury's deliberations on guilt or innocence. Although this distraction and prejudice may be unavoidable evils when the jury will hear both the guilt and penalty phases of trial, there is no counter-balancing interest which justifies any mention of the death penalty once the jury has been waived for sentencing. If there is such an interest, and that interest

in a particular case is weighty enough to overcome the prejudice to the defendant, the State should have the burden of so proving. Needless to say, no such interest has been established here.

I would reverse and remand for a new trial.

CHIEF JUSTICE CLARK joins in this dissent.

Illinois Death Penalty Statute,
Ill. Rev. Stat. ch. 38, para. 9-1 (1981)

9-1. Murder—Death#penalties—Exceptions—Separate hearings—Proof—Findings—Appellate procedures—Reversals

§ 9-1. Murder—Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate—Procedures—Reversals. (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

1. the murdered individual was a peace officer or fireman killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual as a peace officer or fireman; or

2. the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the

grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the Unite States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

4. the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

5. the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

6. the murder individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child; or

7. the murdered individual was under 16 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

8. the murdered individual was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness or possessed other material evidence against the defendant.

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

1. the defendant has no significant history of prior criminal activity;

2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. the defendant acted under the compulsion of threat or menance of the imminent infliction of death or great bodily harm;

5. the defendant was not personally present during commission of the act or acts causing death.

(d) Separate sentence hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating

factors as indicated in Subsection (c). The proceeding shall be conducted:

1. before the jury that determined the defendant's guilt; or
2. before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

3. before the court alone if the defendant waives a jury for the separate proceeding.

(e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) Proof. The burden of proof establishing the existence of any of the factors set forth in Subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure—Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant

to a term of imprisonment under Chapter V of the Unified Code of Correction.[1] If there is an unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exists, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determine unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) Procedure—No Jury. In a proceeding before the court alone, if the court finds that none of the factors found in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in Subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in Subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

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[1] Paragraph 1005-1-1 et seq. of this chapter.

(i) Appellate Procedure. The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) Disposition of reversed death sentence. In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of murder shall be sentenced by the court to a term of imprisonment under Chapter V of the Unified Code of Corrections.

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause the defendant to be brought before the court, and the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.